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Supreme Court of the United States

October Term, 1999

THE STATE OF NEW YORK; THE BOARD OF REGENTS OF THE STATE OF NEW YORK; CARL T. HAYDEN; J. EDWARD MEYER; R. CARLOS CARBALLADA; ADELAIDE L. SANFORD; DIANE O'NEILL McGIVERN; SAUL B. COHEN; JAMES C. DAWSON; ROBERT M. BENNETT; ROBERT M. JOHNSON; ANTHONY S. BOTTAR; MERRYL H. TISCH; HAROLD O. LEVY; ENA L. FARLEY; GERALDINE CHAPEY; RICARDO OQUENDO; ELEANOR BARTLETT; and ARNOLD GARDNER, in their official capacities as members of the State Board of Regents; DEPARTMENT OF EDUCATION OF THE STATE OF NEW YORK; RICHARD P. MILLS, as Commissioner of Education of the State of New York; URBAN DEVELOPMENT CORPORATION OF THE STATE OF NEW YORK; CHARLES GARGANO as Director of the Urban Development Corporation; GEORGE E. PATAKI, as Governor of the State of New York; and H. CARL McCALL, as Comptroller of the State of New York,

Petitioners,

(Caption continued on inside of cover)

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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Dated: February 14, 2000

39 pp

YONKERS BOARD OF EDUCATION; YONKERS BRANCH-NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE; REGINA RYER, a minor by her mother and next friend, CHARLOTTE RYER, on behalf of themselves, and all individuals similarly situated and the CITY OF YONKERS,

Respondents.

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QUESTIONS PRESENTED

1. Whether, and under what circumstances, state officials can be liable under the Fourteenth Amendment and 42 U.S.C. § 1983 for not taking remedial steps to combat local school segregation where the courts found that state officials in no way participated in or condoned the local discriminatory acts that the courts found to have caused the segregation.

2. Where there are explicit findings that the Yonkers schools are desegregated with respect to the *Green* factors and there is no finding that vestiges of the prior segregation remain in the public school system, whether the federal courts may impose liability, unlimited in duration, against state officials for the ongoing costs of a prior desegregation remedy imposed against local municipal and school district defendants.

3. Whether Congress made clear its intent to abrogate the States' Eleventh Amendment immunity in the Equal Educational Opportunities Act of 1974 ("EEOA"), 20 U.S.C. § 170l, *et seq.*

4. Whether Congress intended the EEOA to impose upon the States supervisory responsibility over local educational agencies, and liability based on the failure to exercise such supervisory responsibility.

LIST OF PARTIES

All parties in the court below are listed in the caption to this petition, with parties sued only in their official capacities substituted, where appropriate, pursuant to Rule 35.3 of the Rules of this Court.

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No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1999

THE STATE OF NEW YORK, et al.,

Petitioners,

-v.-

YONKERS BOARD OF EDUCATION, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Attorney General of the State of New York, on behalf of the State and the named state officials and entities, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit entered on November 16, 1999, and a decision of that same court entered on September 23, 1996.

OPINIONS BELOW

The opinions of the United States Court of Appeals for the Second Circuit are reported at 197 F.3d 41 (2d Cir. 1999) and 96 F.3d 600 (2d Cir. 1996), and are reproduced in the appendix at 1a and 66a. The underlying opinions of the United States District Court for the Southern District of New York are reported at 984 F. Supp. 2d 687 (S.D.N.Y. 1997), 880 F. Supp. 212 (S.D.N.Y. 1995) and 888 F. Supp. 591 (S.D.N.Y. 1995), and are reproduced in the appendix at 36a, 123a, and 185a, respectively. The order and judgment of the district court dated February 10, 1998, is reproduced in the appendix at 33a.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit, finally ordering the state defendants to pay one-half of the costs of the Yonkers school desegregation remedy for the 1996-1997 school year, was entered on November 16, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provision relevant to this action is the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, reprinted at 356a. The relevant statutory provisions are 42 U.S.C. § 1983 and the Equal Educational Opportunities Act, 20 U.S.C. §§ 1703, 1706 and 1720, reprinted at 356a -358a.

STATEMENT OF THE CASE

The Yonkers school district, located just north of New York City on the east side of the Hudson River, has a student population of 24,000. In 1986, following six years of litigation, the district court held that Yonkers city officials and the Yonkers Board of Education had undertaken a series of intentionally discriminatory actions over a 45-year period, and ordered them to implement a desegregation plan that continues in effect today. In late 1997, nearly eighteen years after the litigation commenced and twelve years after implementation of the remedial plan by the City and the Board began, the district court ordered the state defendants to bear half of the ongoing costs of the previously ordered desegregation plan, as well as the costs of an expansive new remedial plan which the court ordered to eliminate the vestiges of segregation. The Second Circuit vacated the findings of vestiges and the new remedial plan and remanded to the district court to determine whether vestiges not previously identified by the district court persist in the Yonkers schools to support the imposition of further desegregation measures. The Second Circuit, however, affirmed the district court's order requiring the state defendants to pay half of the ongoing costs of the initial remedial plan entered in 1986 against the City and the Board. This final imposition of liability against the state defendants for the initial desegregation plan, which will run in the hundreds of millions of dollars, is in direct contravention of this Court's precedents and poses important consequences for the State of New York and for other states.

A.

The United States commenced this action in 1980 against the City of Yonkers ("the City"), the Yonkers Board of Education ("the Yonkers Board") and the Yonkers Community Development Agency. At that time, none of the present state defendants, petitioners herein, was named as a party. Seeking the

district court's remedial intervention, the complaint alleged, among other things, that the Yonkers public schools were racially segregated. Shortly after the action was commenced, the Yonkers Branch of the National Association for the Advancement of Colored People ("NAACP") obtained permission to intervene as a plaintiff.

Following several years of discovery and a lengthy trial, the district court concluded, *inter alia*, that the racial segregation of the Yonkers public schools was the result of intentional discrimination by the City and the Yonkers Board. *See United States v. Yonkers Bd. of Educ.*, 624 F. Supp. 1276, 1388-1545 (S.D.N.Y. 1985). This conclusion was based on a history of segregative housing actions by the City, *id.* at 1294-1376, combined with the relationship between the City's housing practices and the Yonkers Board's neighborhood school policy. *Id.* at 1500-1503. The court analyzed a multitude of individual actions taken by the Board and City officials over a forty-five year period to arrive at its finding of intentional segregation. *Id.* at 1388-1500. None of the segregative actions examined by the district court was found to have been taken as a result of state policy or at the suggestion of a state agency or official. *Id.* at 1388-1545.

In May 1986, the district court issued an order against the City and the Yonkers Board requiring immediate implementation of a desegregation plan, now known as EIP I, calling for various school closings, an extensive system of magnet schools, voluntary busing, and student and staff reassignment. *See United States v. Yonkers Bd. of Educ.*, 635 F. Supp. 1538 (S.D.N.Y. 1986). The Second Circuit affirmed the district court in all respects. *See United States v. Yonkers Bd. of Educ.*, 837 F.2d 1181 (2d Cir. 1987), *cert. denied*, 486 U.S. 1055 (1988).

The Yonkers Board commenced implementation of the order and, as the district court later observed, "the racial separation of

students in the Yonkers public schools, which ha[d] existed for decades, ended.... Within a year of the issuance of EIP I, the Yonkers Board achieved desegregation of enrollments among the schools" (207a-208a). Since 1986, the district court has continued to oversee the implementation and expansion of the system-wide EIP I program, which now costs the school district nearly $85 million annually over and above its basic educational costs.

B.

The State of New York, its Governor, the Board of Regents and its members, the State Education Department and the Commissioner of Education became involved in this matter for the first time on September 17, 1987 -- seven years after the litigation began and one year after the district court issued its remedial order. At that time, the Yonkers Board moved for leave to amend its answer to assert a cross-claim against the state parties. A week later, the NAACP moved for leave to file a second amended complaint to assert a claim against the state parties. The United States opposed the motions, which were nonetheless granted on January 19, 1989.[1]

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[1] The Yonkers Board and NAACP also added the Urban Development Corporation of the State of New York ("UDC") and its director, based on claims that by building approximately 1800 units of subsidized housing in southwest Yonkers prior to 1975, the UDC had "exacerbated" residential and school segregation in Yonkers (296a, 310a-311a). The parties have not sought, and the courts below have not imposed, specific educational relief against the UDC defendants. All housing claims against the UDC defendants were settled by order of the district court dated December 1, 1998. Because the actions of UDC cannot be imputed to the State, *see United States v. Yonkers*, No. 92-6198, slip opn at 3, 990 F.2d 623 (2d Cir. Jan. 13, 1993) (holding UDC and its director not shielded by Eleventh Amendment immunity because UDC is an entity separate and apart from the State), the legal conclusions and factual findings relative to UDC are not discussed herein unless otherwise relevant.

The amended pleadings alleged that various actions and inaction of the State and its educational entities and officials had a "chilling effect" (293a) and a "negative impact" (296a) on the initiation by Yonkers of unspecified projects and plans for racial integration. The amended pleadings alleged claims arising under the Equal Protection Clause of the Fourteenth Amendment and related implementing statutes. Jurisdiction was asserted under 28 U.S.C. §§ 1331, 1343(3) and (4), 2201 and 2202 (286a, 303a). The cross-claimants and plaintiffs sought relief directing the state parties "to help implement and fund a plan ... to eradicate the effects of segregation" and to "participate" in the existing desegregation plan (299a). The state parties sought unsuccessfully to have the complaint against them dismissed for failure to state a claim upon which relief could be granted and on Eleventh Amendment grounds.

In 1993, the district court held the first of three trials involving the state defendants. The first trial addressed the question of whether there were "vestiges" of past segregation still extant in the Yonkers school district. The court reasoned that if there were no vestiges, no additional desegregation relief would be required and the state parties would be entitled to dismissal of all claims against them for that reason. The court did not explicitly distinguish between the claims for the State's financial participation in the ongoing EIP I, the remedial plan previously ordered against the City and Yonkers Board, and the claims seeking a further desegregation remedy to eliminate the vestiges of segregation.

After a three-week trial, the court issued an opinion finding that two vestiges of past segregation remained, specifically (i) low teacher expectations for minority students and (ii) insufficient use of multicultural teaching techniques and curriculum (221a). *See United States v. City of Yonkers*, 833 F. Supp. 214, 222 (S.D.N.Y. 1993). The court found principal support for its findings in evidence of racial disparities in student

achievement test results (216a-220a, 230a-245a). *Id.* at 220-222, 226-236.

The district court held a second, six-week trial in 1994 on the question of whether the state parties are liable and should be required to participate in any remedial plan to eliminate the vestiges of *de jure* segregation of the Yonkers schools. The parties established at that trial that New York State has prohibited *de jure* segregation since 1900, *see* 1900 N.Y. Laws, c. 492, codified at N.Y. Educ. Law § 3201(1) (McKinney 1995), and that as a matter of policy, the Board of Regents had long sought the elimination of all school segregation, without regard to whether it was *de jure* or *de facto*. *See* 1960 Regents Statement on Intercultural Relations in Education (Trial Exh. 3-1; 333a) and 1975 Regents Statement on Racial Integration of Schools (Trial Exh. 3-15; 336a). Trial proof also showed that, during the period in question, the State Education Department assisted local school districts in eliminating segregation by, among other things, providing technical assistance and support. *See, e.g.*, Report on the Education Department's School Desegregation Efforts Over the Past Three Years - January 1981 (Trial Exh. 14-58; 339a). The State Education Department also assisted those who wished to petition under New York Education Law § 310 for review of any school district's actions or inaction with respect to desegregation.[2] The evidence

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[2] New York's Education Law § 310, which authorizes anyone "aggrieved" by any action of a school district to file a § 310 petition with the Commissioner of Education to challenge such action, also empowers the Commissioner to initiate such proceedings. The trial testimony established that although there are about 250 proceedings under § 310 annually--covering, in addition to racial balance issues, such diverse subject areas as grading policies, special education, tenure rights, and pensions (Tr. 1393-94)--only one such proceeding during the period between 1968 and 1987 was initiated by the Commissioner himself. In that one situation, there was no aggrieved party within the district who could file a § 310 petition (Tr. 2186, 2203).

established that, between 1968 and 1987, at least 48 decisions concerning desegregation were issued under § 310, and in each, the State Education Department ordered implementation of desegregation plans (Trial Exhs. C-1 -- C-48).[3]

Additional proof adduced at trial showed that although no one filed a § 310 petition complaining of school segregation in Yonkers and the State Commissioner of Education did not *sua sponte* initiate such a proceeding, the State Education Department sought to encourage and assist Yonkers to achieve desegregation. These efforts were largely spurned by local authorities. *See, e.g.*, 624 F. Supp. at 1469 (despite grant provided to Yonkers from the State Racial Balance Fund, efforts to develop desegregation proposals were discontinued due to district superintendent's reluctance to pursue such proposals). The efforts were also severely hampered by the curtailment of state funding for the State Education Department as a whole in the wake of the economic collapse of New York City in the mid-1970s (Trial Exhs. FF-7, FF-9; Tr. at 161, 244). Ultimately, when the "carrot" proved unavailing, the Department tried the "stick" by withholding for the entire 1983-1984 school year state magnet funds that had been appropriated by the Legislature for Yonkers (Trial Exhs. FFF, GGG). Similar action was taken for the 1984-1985 school year (Trial Exhs. DDDDD, EEEEE), the last year for which proof was taken.

After trial, the district court made the following findings of fact, which were not disturbed by the Second Circuit (142a):

- There is no evidence that State education officials undertook affirmative actions to preserve segregation in the Yonkers schools, or that they indicated to anyone in Yonkers, either

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[3] *See, e.g., In the Matter of the Appeal of Burbank Mitchell*, 18 Ed. Dept. Rep. 9761 (1978) (Trial Exh. C-21); *In the Matter of the Appeal of Cleola Mae Sylvers*, 15 Ed. Dept. Rep. 9225 (1976) (Trial Exh. C-34).

tacitly or otherwise, that segregation in the schools should be preserved.

- There is no evidence that State education officials actively impeded Yonkers officials from taking steps on their own to remedy the school segregation.
- There is no evidence that State education officials communicated to anyone in Yonkers that they would purposefully "look the other way" should Yonkers decide to continue to be in violation of State desegregation policy.
- There is no evidence that State education officials adopted a policy that indicated specific approval of the manner in which Yonkers was managing the racial makeup of its schools.
- There is no evidence that, had a Yonkers citizen filed a desegregation petition under § 310 of the New York Education Law, the State would not have responded to that petition promptly and fairly. Indeed, the record supports the finding that the Commissioners of Education in most instances enforced the racial integration policy in connection with proceedings brought before them by private citizens under § 310.

United States v. City of Yonkers, 880 F. Supp. 212, 224 (S.D.N.Y. 1995).

The court therefore dismissed all claims against the state parties predicated on the Equal Protection Clause. In particular, with respect to the individual Regents and the Commissioner of Education, the court held that the claims were precluded by the Second Circuit's decision in *Arthur v. Nyquist*, 573 F.2d 134 (2d Cir.), *cert. denied*, 439 U.S. 860 (1978), which the court construed to mean that a State's actual or constructive knowledge of wrongdoing and the power to end segregation were insufficient to impose liability under 42 U.S.C. § 1983 (162a-166a). *United States v. City of Yonkers*, 880 F. Supp. at 234-236. The court further held that the claims as asserted against the State, the State Education Department, the Board of

Regents, and the Governor were barred by the Eleventh Amendment (154a-156a). *Id.* at 230-231.

The court then *sua sponte* suggested that the Equal Educational Opportunities Act, 20 U.S.C. § 1701, *et seq.* ("EEOA"), might provide a basis for holding a State vicariously liable for *de jure* school segregation at the local level (170a-175a). *Id.* at 238. It "[left] to another day and any further application of the parties" the question of whether the EEOA could therefore provide an alternative basis for relief (175a). *Id.* at 240.

Thereafter, respondents moved to amend their pleadings yet again, to assert a claim under the EEOA. In a second decision dated June 14, 1995, the district court permitted the amendment but denied relief (185a-204a). *United States v. City of Yonkers*, 888 F. Supp. 591 (S.D.N.Y. 1995). The court ruled that the allegations against the state parties under the EEOA failed to state a claim upon which relief could be granted because that statute was not intended to afford protections against racial discrimination beyond those provided by the Fourteenth Amendment (190a-191a). *Id.* at 594-595.

C.

On September 23, 1996, the Second Circuit (Kearse, Altimari, Moran, JJ.) vacated the dismissal of both the equal protection and EEOA claims (66a). *United States v. Yonkers Bd. of Educ.*, 96 F.3d 600 (2d Cir. 1996). With respect to equal protection, the court held the Regents and the Commissioner of Education responsible for perpetuation of the *de jure* segregation which had been created solely by the City and the Yonkers Board. It also held that the State itself, the State Education Department, and the Board of Regents, while immune from any liability under 42 U.S.C. § 1983 by virtue of the Eleventh

Amendment, could incur liability under the EEOA, which it held abrogated that immunity.

The court reasoned that just as the City and the Yonkers Board had been found constitutionally liable for having intentionally created segregated schools in response to community pressure they knew to be racially motivated, the Regents and the Commissioner were constitutionally liable because their omission to act had the foreseeable effect of perpetuating known segregation (93a-96a). 96 F.3d at 613-614. The court further found that the Regents' and the Commissioner's failure to act affirmatively to combat segregtion was in response to legislative pressure they knew to be racially motivated (101a-105a). *Id.* at 616-617. The Second Circuit cited several factors as dispositive of the state defendants' liability: (1) the Regents and the Commissioner knew that segregation existed in the Yonkers school district and they "knew or should have known" that the segregation in Yonkers was *de jure*; (2) they had the power to take steps to remedy the segregation; and (3) their failure to exercise their power in a way which the court believed would have been effective was due to political pressures they knew to be racially motivated (96a-97a). *Id.* at 614. The court wrote that "[e]ven if an official had no statutory duty to act, he may be [constitutionally] liable if his refusal to act was a response to pressures that were known to be racially motivated" (96a). *Id.*

In regard to the EEOA, the Second Circuit ruled that the language of 20 U.S.C. § 1703 -- that "[n]o State shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin" -- "expressly abrogat[es] the States' Eleventh Amendment immunity to the extent necessary to effectuate the purposes of the EEOA" (111a). 96 F.3d at 619. It cited no decision of this Court in support of that conclusion.

The court then disposed of the district court's concern that the EEOA could not impose "supervisory liability" on the state

parties because it was intended to be coextensive with the Fourteenth Amendment, which does not impose such liability. Agreeing with *United States v. School Dist. of Ferndale*, 577 F.2d 1339, 1347-48 (6th Cir. 1978), the court held that the EEOA imposes "supervisory liability" on States which provide financial assistance to school districts engaging in discriminatory conduct while failing to take action requiring those districts to bring the operation of their schools into compliance with the Fourteenth Amendment (112a-115a). 96 F.3d at 620-621. The matter was remanded to the district court for further proceedings.

The state defendants filed a petition for writ of certiorari of the Second Circuit's nonfinal liability decision. This Court denied the petition on June 23, 1997. *See* 521 U.S. 1104 (1997).

D.

In 1997, the district court held a third trial, this time to address whether the vestiges that it had previously found in its August 30, 1993 decision remained in the Yonkers public schools and, if so, to formulate a further remedial plan. On October 8, 1997, the district court found, without particularizing, that vestiges of segregation persisted (39a-43a). *United States v. City of Yonkers*, 984 F. Supp. 687, 690-691 (S.D.N.Y. 1997). That same day, the court also issued its remedial order, entitled "Order For Further Desegregation Relief in the Yonkers Public Schools" (hereinafter "EIP II order"). *Id.* at 713-714. The EIP II order required the implementation of educational improvement programs estimated at that time to cost $560 million over an eight-year period. Those programs included the development and implementation of revised curriculum, staff and student support services that would enable the students to meet state and national educational standards, recruitment and training to enable staff to teach a diverse student body more effectively, information-rich classrooms, an extensive network of

classroom computers, universal full-day prekindergarten, and smaller class sizes.

While the case was on remand, the City of Yonkers moved to amend its pleading to assert a cross-claim against the state defendants, and to add as defendants the Governor and the New York State Comptroller. The City sought to have the State participate in the ongoing costs for EIP I, which included the costs of operating the expanded system of magnet schools and busing, as well as in the costs for any further remedial plan ordered by the court. The district court granted the motion and subsequently denied the state defendants' motion to dismiss on grounds of the Eleventh Amendment, lack of municipal capacity to sue, and standing.

The City, in a motion supported by the NAACP and the Yonkers Board, then sought monetary relief against the state defendants to defray part of its costs incurred in the 1996-1997 school year for implementing the initial EIP I order. By order and judgment dated February 10, 1998, the district court directed the state defendants to pay the City of Yonkers 50% of the EIP I costs incurred in the 1996-1997 school year (33a). The district court found that EIP I required $55 million in operating costs in the 1996-1997 school year. On February 10, 1998, the court entered an order and judgment against the state defendants for $9.855 million, reflecting the fact that the State had already provided to Yonkers voluntary magnet school and transportation aid during that year to support the school district's desegregation efforts.[4]

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[4] For all subsequent years the district court has adopted a formula which requires the state to pay a greater proportion of the remedial costs over the next few years, but which ultimately results in a 50%/50% sharing of such costs with the City over a nine-year period. For the 1997-1998 school year, the court found EIP I expenditures of approximately $70.4 million, which resulted in a state share of about $53 million, less appropriate credits for

E.

The state defendants appealed from both the October 8, 1997 EIP II order and the February 10, 1998 state EIP I order and judgment. On June 22, 1999, the Second Circuit issued a decision (i) reversing the district court's vestiges findings and vacating the EIP II order, and (ii) affirming the order and judgment apportioning liability against the state defendants for EIP I costs. Finding that there was insufficient record support for the vestiges cited by the district court, a majority of the Second Circuit (Jacobs and McLaughlin, JJ.) initially voted to reverse the findings of vestiges and vacate the EIP II order without remand. In partial dissent, Judge Sack, while agreeing that the findings of the identified vestiges and EIP II remedy were unsustainable, voted to remand to the district court for further findings on the existing record as to the presence of any other vestiges of segregation in the Yonkers public schools.

On July 2, 1999, the NAACP petitioned the Second Circuit for rehearing or rehearing *en banc*. On November 16, 1999, the Second Circuit granted the petition and vacated its prior opinion. *United States v. Yonkers Bd. of Educ.*, 197 F.3d 41 (2d Cir. 1999). In its opinion on rehearing, the panel adhered to its earlier conclusion "that there was insufficient record support for the only vestiges found by the district court and that the [EIP II] remedy imposed by the district court was unsustainable" (5a). *Id.* at 45. The court concluded that the evidence submitted with respect to the allegedly inadequate multicultural curriculum and teaching techniques and low teacher expectations was legally insufficient to constitute vestiges (16a-23a). *Id.* at 51-54. It

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voluntary aid. For the 1998-1999 school year, the estimated EIP I costs are $84.3 million, of which the State has been required to pay approximately $55 million. The precise calculation of the State's funding responsibility for these two years is at issue in appeals currently pending in the Second Circuit.

further concluded that the analysis of the expert for the Yonkers Board showing test score disparities that correlate with "race" was legally insufficient to demonstrate the presence of residual effects of segregation (23a-25a). *Id.* at 54-55. Consequently, the court again ruled that the sweeping quality of education remedy comprising EIP II imposed by the district court exceeded its authority (25a-27a). *Id.* at 55-56.

The panel on rehearing, however, was convinced by Judge Sack's view that it was prudent to remand the case to the district court to search the record again for the presence of any other vestiges. 197 F.3d at 46. The court therefore remanded for the limited purpose of eliciting further findings on the existing record as to whether other previously unidentified vestiges of segregation persist in the Yonkers schools (31a-32a). *Id.* at 58.

With respect to the February 10, 1998 EIP I order and judgment, the court again unanimously voted to affirm the district court's 50% apportionment against the state defendants of ongoing EIP I costs (3a). 197 F.3d at 57. In so doing, the court rejected the state defendants' arguments that no continuing liability for EIP I could be imposed against them absent a finding of vestiges. The court reasoned that because the state defendants had been adjudicated joint tortfeasors and there had yet been no declaration of unitary status, the state defendants could be held responsible for paying one-half of the ongoing costs of the EIP I remedy that had previously been imposed against the City and Board, regardless of whether vestiges now exist (29a). *Id.*

The Second Circuit's decision results in a final judgment against the State to pay 50% of the EIP I costs for the 1996-1997 school year. It is now clear that the State will be required to pay, at a minimum and regardless of what happens with respect to EIP II following remand, 50% of the annual ongoing EIP I costs until there is a formal judicial declaration of unitary status. This will result in state expenditures of hundreds of

millions of dollars. Once these EIP I expenditures have been incurred and the payments made, there is substantial risk that the State will not be able to recoup such payments if the Court waits until after the proceeding on remand relating to EIP II to hear the underlying liability issue presented in this petition.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted to correct the Second Circuit's misapprehension of this Court's precedents and to ensure that the Second Circuit's decisions are not used as precedent to impose novel and expansive liability on the States for the unconstitutional acts of their municipal subdivisions and local school districts. In view of the fact that the State is being required to devote hundreds of millions of dollars to the implementation of a desegregation order for a single school district of only 24,000 students, the issues presented by the Second Circuit's decisions are of vast importance to the State of New York and to States throughout the country.

The Second Circuit's liability holding is premised on the findings that state officials knew of the *de facto* segregation of the Yonkers public schools, and that they *should have known* that such segregation was illegal *de jure* segregation. The courts below did not cite or rely on any findings that state officials had actual knowledge of the manifold intentionally discriminatory acts that led those courts to impose liability against the City and Yonkers Board. The finding of liability based on the inference that state officials should have known of the *de jure* nature of the segregation directly conflicts with this Court's recent rulings that actual knowledge is a prerequisite to the imposition of supervisory liability under the Fourteenth Amendment and 42 U.S.C. § 1983.

Moreover, the courts below were without jurisdiction to require the state defendants to pay half of the ongoing costs of

the desegregation remedy previously imposed against the City and the Board, where full desegregation of the schools as measured by the *Green*[5] factors has long since been achieved and the courts have identified no vestiges of the prior segregation currently extant in the Yonkers public schools. Finally, the Second Circuit's rulings with respect to the Equal Educational Opportunities Act are in direct contravention of this Court's Eleventh Amendment jurisprudence and of the scope of liability set forth in that statute.

POINT I

THE SECOND CIRCUIT'S HOLDING THAT STATE OFFICIALS ARE LIABLE UNDER THE FOURTEENTH AMENDMENT FOR FAILING TO TAKE AFFIRMATIVE REMEDIAL STEPS TO COMBAT LOCAL SCHOOL SEGREGATION, ABSENT ANY STATE PARTICIPATION IN OR ACTUAL KNOWLEDGE OF THE LOCAL DISCRIMINATORY ACTS, DIRECTLY CONFLICTS WITH RECENT DECISIONS OF THIS COURT AND CONSTITUTES AN UNWARRANTED EXPANSION OF CIVIL RIGHTS LIABILITY.

The Second Circuit's 1996 decision holding New York State education officials liable under 42 U.S.C. § 1983 for not taking actions to eradicate the pre-1985 segregation of the Yonkers public schools is irreconcilable with the civil rights precedents of this Court. The Second Circuit upheld "constructive knowledge" as a basis for imposing supervisory liability on state officials for failing to exercise enforcement powers to correct the unconstitutional acts of municipal subdivisions. This holding directly conflicts with this Court's recent precedents holding that

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[5] *Green v. County School Board*, 391 U.S. 430 (1968).

actual knowledge, not constructive knowledge, of constitutional violations is a prerequisite to imposing supervisory liability on governmental entities for the constitutional violations caused by their employees or others under their control. It also erroneously premises liability on state officials' constructive knowledge of a *local* constitutional violation and their failure to take action to remedy illegality which was caused by legally distinct political subdivisions of the State.

This Court has held that, absent a policy or custom that directly causes a constitutional violation, a municipality can be held liable under the Fourteenth Amendment and 42 U.S.C. § 1983 for the constitutional violations of its employees only upon proof that policy-making officials deliberately disregarded constitutional consequences which were actually known or plainly obvious. *See Board of County Commissioners of Bryan County v. Brown*, 520 U.S. 397, 398 (1997). Subsequently, in *Gebser v. Lago Vista Independent School District*, 524 U.S. 274 (1998), this Court, employing this same "deliberate indifference" standard, expressly ruled that constructive knowledge is not enough to establish liability against recipients of federal funds in a suit alleging teacher-on-student harassment. *See also Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999) (holding under same standard that school district could be held liable under Title IX for student-on-student harassment only if school officials had actual knowledge of misconduct and deliberately chose to remain indifferent to it). The Court has insisted on this more stringent "actual knowledge" standard to ensure that liability is placed on an entity only where its own culpability is the "moving force" behind the constitutional violation. Without such a rigorous standard, the Court explained, municipal liability "collapses into *respondeat superior* liability," and raises "serious federalism concerns." *Board of Commissioners of Bryan County v. Brown*, 520 U.S. at 415.

The Second Circuit held that state officials could be held liable based on constructive, as opposed to actual, knowledge that the segregation in the Yonkers public schools was *de jure*. It concluded:

> In sum, the record evidence amply supports the district court's finding that the State defendants had full knowledge of the nature, causes and extent of the segregation in the Yonkers public schools, and that they knew *or should have known* that the school segregation in Yonkers was *de jure*.

(102a) (emphasis added). The court recounted evidence showing that state officials were aware of the numerical racial imbalances of students in the Yonkers public schools; the testimony of a "Specialist in Educational Integration" employed by the State Education Department ("SED") that the predominantly minority schools tended to have worse physical plants and more minority teachers than those predominantly attended predominantly by nonminorities; and evidence that top state educational officials knew that there would be significant race-based opposition to desegregation in the community. None of this evidence demonstrated -- nor did the court conclude that it demonstrated -- that anyone at SED, let alone the Commissioner or any of the Regents, had actual knowledge that the cause of the segregation of the Yonkers schools was the intentionally discriminatory actions over a 45-year period by local municipal and school board officials.

Nor did any of this evidence show that it was plainly obvious to the Commissioner or the Regents that the segregation was *de jure*. Remarkably, neither the district court nor the Second Circuit examined state officials' knowledge of the individual housing and school-related decisions by local and school board

officials over four decades, which those courts found to be the intentional acts of segregation forming the basis of liability of the City of Yonkers and the Yonkers Board of Education. Neither court made any findings, nor could they have, that this complex history of local decisions made it plainly obvious to the Commissioner or the Regents that the segregation was intentionally caused by City and Board officials.

Holding state officials liable based solely on constructive knowledge, as opposed to actual knowledge, vitiates any confidence that the constitutional injury resulted from their own culpable conduct. This is particularly of concern because a State and its local school districts and municipalities are legally discrete governmental units which have distinct responsibilities under state law, a circumstance well recognized in this Court's decisions holding that States are entitled to Eleventh Amendment immunity while municipalities and local school districts are not. *See Will v. Michigan Police Dep't*, 491 U.S. 58, 70 (1989); *Monell v. New York Dep't of Social Services*, 436 U.S. 658, 690, n.54 (1978). Indeed, the Second Circuit undertook no analysis of the respective state and local roles which exist as a matter of state law. Given this, and in view of the multitude of decisionmakers at the state level, both programmatic and budgetary, the Second Circuit's imposition of liability on state officials based on a *less* demanding standard than that applied to municipalities and school districts with respect to actions of their employees, is especially novel and troublesome.

The Second Circuit's holding is in tension with *Bush v. Viterna*, 795 F.2d 1203 (5th Cir. 1986), and *Reid v. Kayye*, 885 F.2d 129 (4th Cir. 1989). There, the Fourth and Fifth Circuits rejected the claimed "supervisory liability" of state officials to redress unconstitutional conditions at the local level, notwithstanding state law requiring the state agencies to issue standards which they had the authority to enforce, because state law placed the responsibility for operating the county jails on the

county rather than with the state agencies. *Bush*, 795 F.2d at 1206; *Reid*, 885 F.2d at 132. As explained in *Bush*, "[T]he effort by Texas to improve conditions at its 254 county jails is not subject to federal superintendence." 795 F.2d at 1204. Further, "[t]he enforcement of state law is the job of the states, and the federal civil rights statute may not be used to bootstrap alleged violations of state law into federal claims." 795 F.2d at 1209. Compare *Reed v. Rhodes*, 662 F.2d 1219 (6th Cir. 1981) (holding the Ohio State Board of Education and Superintendent of Public Instruction liable for local segregation based primarily on the affirmative act of providing funding to the locality in the face of their specific statutory duty to withhold funding under the circumstances); and *Penick v. Columbus Bd. of Educ.*, 663 F.2d 24 (6th Cir. 1981) (same), *cert. denied*, 455 U.S. 1018 (1982).

This Court has never addressed the circumstances under which state officials may be held liable for not taking action to correct *de jure* school segregation caused by local entities, where the state had no affirmative complicity in causing such segregation. In the case bearing closest resemblance the circumstances of this case, *Milliken v. Bradley*, 433 U.S. 267 (1977), and *Milliken v. Bradley*, 418 U.S. 717 (1974), Michigan did not challenge the lower courts' finding of liability, as this Court expressly noted. *See* 433 U.S. at 289. The question is now squarely presented in this case. Certiorari is warranted on this basis alone.

POINT II

IN THE ABSENCE OF VESTIGES THERE IS NO JURISDICTIONAL BASIS FOR IMPOSING ANY LIABILITY ON THE STATE OR ITS OFFICIALS FOR THE COSTS OF EIP I.

The Fourteenth Amendment charges governmental officials who have caused segregated school systems "with an affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." *Green v. County School Board*, 391 U.S. 430, 437-438 (1968). Each instance of a failure or refusal to fulfill this affirmative duty continues the violation of the Fourteenth Amendment. *See Columbus Board of Education v. Penick*, 443 U.S. 449, 459 (1979). Without a finding of current segregation or vestiges, however, there can be no basis for a federal court to exercise its remedial authority.

Here, there is no judicial finding that any segregation or vestiges of segregation remain in the Yonkers public schools. The district court imposed EIP I on May 13, 1986. In its 1993 decision, the district court opened with the praise, "[a]s a result of good faith and zealous implementation by the Yonkers Board of Education * * * and its staff of [EIP I], the racial separation of students in the Yonkers public schools, which had existed for decades, ended. * * * Within less than a year of the issuance of EIP I, the Yonkers Board achieved desegregation of enrollments among the schools." (207a-208a [internal quotations omitted]). As the Second Circuit observed in its November 16, 1999 decision, "[i]t is undisputed that the Yonkers School Board has achieved full integration as measured by the *Green* factors." (15a, *citing Green v. County School Board*, 391 U.S. 430, 435). Moreover, the Second Circuit went on to hold that the district court had not identified any legally sufficient vestiges of the prior segregation.

The district court correctly observed long ago in this case that, "if no vestiges exist, this litigation against the State will, of course, be dismissed" (211a). *United States v. City of Yonkers*, unreported (S.D.N.Y. July 10, 1992), *quoted in* 833 F. Supp. 214, 217 (S.D.N.Y. 1993). This is because, absent vestiges, there is no current violation of the Fourteenth Amendment and thus state officials acting in their official capacity cannot be ordered to participate in any prospective injunctive relief. Accordingly, the Second Circuit erred in ordering the State to pay for half of the continuing costs of EIP I for the 1996-1997 school year.[6]

The fact that the courts have not formally entered a declaration that the Yonkers school system is unitary is immaterial. A declaration of unitary status occurs upon findings not only that vestiges have been eliminated to the extent practicable, but also that there has been complete compliance with the remedial decree and that the school district has

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[6] Claims against the State defendants for the costs of EIP I asserted by the City and the Yonkers Board are barred for the additional reason that they are claims under New York law for contribution, which are barred by the Eleventh Amendment and by principles of municipal incapacity to sue the sovereign and standing. *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 251 (1985) (Eleventh Amendment bars ancillary claims for indemnification); *City of Trenton v. New Jersey*, 262 U.S. 182, 189-190 (1923) (municipality lacks capacity to sue State); *see Dekalb County School Dist. v. Schrenko*, 109 F.3d 680, 689 (11th Cir.), *cert. denied*, 522 U.S. 1015 (1997) (rejecting school district's cross-claim against State for costs of desegregation remedy on grounds of federalism and comity); *Stanley v. Darlington County School Dist.*, 84 F.3d 707, 716 (4th Cir. 1996) (same); *Kelley v. Metropolitan County Board of Education of Nashville & Davidson County*, 836 F.2d 986, 995-998 (6th Cir. 1987), *cert. denied*, 487 U.S. 1206 (1988) (rejecting school district's cross-claim against the State for financial participation in previously imposed desegregation remedy on grounds of municipal incapacity, state sovereignty, and federalism). Such state law claims cannot serve as a basis for the federal courts to impose liability against the State for a desegregation remedy previously imposed against the municipal defendants.

demonstrated a good-faith commitment to continued compliance with the decree. *See Missouri v. Jenkins*, 515 U.S. 70, 89 (1995), citing *Dowell v. Board of Educ.*, 498 U.S. 237, 249-250 (1991). Factors relating to whether the City and Board have in good faith complied with the prior remedial decree are not relevant to whether the elements of a cause of action against state officials now exist. Given the alignment of the parties in this case, with the City and Board having a substantial disincentive to seeking a formal declaration of unitary status, any theoretical relevance of the fact that there has yet been no formal declaration of unitary status is completely dissipated.

POINT III

THE SECOND CIRCUIT'S HOLDING THAT THE STATE INSTITUTIONAL DEFENDANTS MAY BE HELD LIABLE UNDER THE EEOA FOR FAILING TO REMEDIATE DISCRIMINATION CAUSED BY LOCAL EDUCATIONAL AGENCIES CONFLICTS WITH THIS COURT'S ELEVENTH AMENDMENT JURISPRUDENCE AND A FIFTH CIRCUIT COURT DECISION CONSTRUING THE SCOPE OF EEOA LIABILITY.

Should petitioners prevail on their argument that individual state officials cannot be held liable under the Fourteenth Amendment and 42 U.S.C. § 1983, the correctness of the Second Circuit's holding that the state institutional defendants are alternatively liable under the Equal Educational Opportunities Act, 20 U.S.C. §§ 1701-1758 ("EEOA" or "Act") becomes relevant. The court's holding that the EEOA abrogates the States' Eleventh Amendment immunity is in direct conflict with this Court's decisions. Moreover, the Second Circuit's conclusion that the EEOA imposes upon state educational agencies supervisory responsibility and liability which is broader than that which exists against state officials under the Fourteenth

Amendment is erroneous, directly conflicts with a Fifth Circuit decision, and results in the imposition of novel and expansive liability against States.

A. The Second Circuit's Holding That the Equal Educational Opportunities Act Abrogates the States' Eleventh Amendment Immunity Conflicts with this Court's Decisions.

The Second Circuit's holding that the EEOA abrogates the States' Eleventh Amendment immunity is in conflict with this Court's controlling precedents. This Court has consistently held that "Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute." *Kimel v. Florida Bd. of Regents*, __ U.S. __, 120 S. Ct. 631, 2000 WL 14165 (Jan. 11, 2000) (quoting *Dellmuth v. Muth*, 491 U.S. 223, 228 (1989), and *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985)). Put another way, this Court demands that the congressional intent to abrogate be manifest in "unequivocal statutory language." *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 56 (1996) (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. at 246); *see also Dellmuth v. Muth*, 491 U.S. at 230 ("evidence of congressional intent [to abrogate] must be both unequivocal and textual").

The Court has made clear that a statute's mere reference to, and imposition of obligations on, the State cannot substitute for the requisite unequivocal declaration that Congress is exercising its power to abrogate. *Dellmuth v. Muth*, 491 U.S. at 232. Similarly, "[a] general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment." *Atascadero State Hosp. v. Scanlon*, 473 U.S. at 246; *accord Dellmuth v. Muth*, 491 U.S. at 231; *Welch v. Texas Dept. of Highways and Public Transp.*, 483 U.S. 468, 476 (1987); *Blatchford v. Native Village of*

Noatak, 501 U.S. 775, 787 n.4 (1991) ("[t]he fact that Congress grants *jurisdiction* to hear a claim does not suffice to show Congress has abrogated all *defenses* to that claim").

In its 1996 state liability decision, the Second Circuit grounded its holding of abrogation *solely* on the EEOA's apparent imposition of obligations on the State and state educational agencies to ensure compliance with the Act (46a) ("[t]he Act ... in providing explicitly that '[n]o State' shall engage in the prohibited conduct and in including within the prohibition acts by 'State educational agenc[ies],' obviously reflects Congress's intention to hold the States and their agencies liable"). Notably, the Second Circuit did not cite any decision of this Court in its ruling on this issue.

The impermissibility of the Second Circuit's inference of abrogation on this solitary basis is plain under this Court's decision in *Dellmuth*. There, the respondent contended that the Education of the Handicapped Act's frequent reference to the States and delineation of the States' role in providing proper education for handicapped children evinced a congressional intent to abrogate the States' immunity. 491 U.S. at 232. This Court disagreed, stating:

> This statutory structure lends force to the inference that the States were intended to be subject to damages actions for violations of the EHA. But such a permissible inference, whatever its logical force, would remain just that: a permissible inference. It would not be the unequivocal declaration which, we reaffirm today, is necessary before we will determine that Congress intended to exercise its powers of abrogation. *Id.*

The Second Circuit's conclusion in the instant case simply cannot be harmonized with *Dellmuth*.

The fact that the Seventh and Ninth Circuits have also found the EEOA to abrogate the Eleventh Amendment on identically flawed grounds only underscores why certiorari is warranted in this case. *See Gomez v. Illinois State Bd. of Educ.*, 811 F.2d 1030 (7th Cir. 1987); *Los Angeles Branch NAACP v. Los Angeles Unified School Dist.*, 714 F.2d 946 (9th Cir. 1983), *cert. denied*, 467 U.S. 1209 (1984). In both cases -- decided before *Dellmuth* and this Court's more recent pronouncements on the issue -- the courts relied only on the apparent obligations imposed on the States and the general authorization for suit in federal court as evincing a congressional intent to abrogate. *See Gomez v. Illinois State Bd. of Educ.*, 811 F.2d at 1037-1038; *Los Angeles Branch NAACP v. Los Angeles Unified School Dist.*, 714 F.2d at 946. Subsequent decisions of this Court, particularly *Dellmuth*, confirm that these holdings are erroneous.

Thus, the law of three circuits on this issue is currently in conflict with the controlling decisions of this Court. In the instant case, the EEOA is being employed to impose vast, prospective liability on New York State and its educational entities, and will undoubtedly be wielded in a similar fashion in other States. *See, e.g., Flores v. Arizona*, 48 F. Supp. 2d 937 (D. Ariz. 1999). (Eleventh Amendment no bar to suit against State under EEOA for failing to provide limited English speaking children with proper instruction). Accordingly, the Second Circuit's erroneous conclusion that the State's immunity is abrogated under the EEOA merits consideration by this Court.

B. The Second Circuit Improperly Construed the EEOA to Impose Supervisory Responsibility on the States to Enforce Local Educational Agencies' Compliance with Federal Equal Protection Principles and Is in Conflict with the Fifth Circuit.

Even if Congress intended in the EEOA to make the States answerable in federal court for their own intentional discriminatory conduct, a proper reading of the statute does not reveal a congressional intent to enlarge state liability beyond that which exists under the Fourteenth Amendment. The Second Circuit's interpretation of the Act as imposing a broader supervisory obligation upon the States to enforce local desegregation is in conflict with *United States v. Texas*, 680 F.2d 356, 373 (5th Cir. 1982).

The Second Circuit construed the EEOA as "impos[ing] on states the obligation to enforce the equal-educational opportunity obligations of local educational agencies," (112a-113a, citing *Idaho Migrant Council v. Board of Education*, 647 F.2d 69, 71 (9th Cir. 1981), and *United States v. School District of Ferndale*, 577 F.2d 1339, 1347 (6th Cir. 1978)). The court wrote that it agreed with the Sixth Circuit's view in *Ferndale* that a proper EEOA claim is stated by the allegations that the State tolerated and provided assistance to local school districts which it knew to be engaging in the discriminatory assignment of students and teachers. The Second Circuit went on to write that the district court in the present case "correctly stated that 'the literal and unambiguous language of section 1703 ... seems to impose on states ... supervisory liability,'" and suggested that the district court was also correct in stating that "if one were to set about to write a statute in a way that provided for vicarious state liability, one could not find language that was more clear and direct than that contained in § 1703 of the EEOA" (114a-115a).

The Second Circuit's interpretation is in conflict with the Fifth Circuit's ruling that § 1703(b) is coextensive with the Fourteenth and Fifth Amendments, prohibiting only purposeful discrimination by state actors. *See United States v. Texas*, 680 F.2d 356, 371, 373 (5th Cir. 1982). The Second Circuit did not address *United States v. Texas* in its decision. Instead, it cited a prior Fifth Circuit decision, *United States v. Hinds County School Bd.*, 560 F.2d 619, 623 (5th Cir. 1977), that is distinguished in *Texas* as not applying to § 1703(b).

In *United States v. Texas*, the Fifth Circuit reversed an order of the district court which required that Texas provide bilingual instruction to all Mexican-American children of limited English proficiency in Texas public schools, based in part on its interpretation of the EEOA, 20 U.S.C. §§ 1703(b) and (f). Among its many findings, the district court concluded that the State as a whole had discriminated against Mexican-American students and that such discrimination constituted a breach of § 1703(b). The Fifth Circuit discussed the findings of the district court and concluded that there was insufficient evidence in the record "to prove that the State as a whole has in the past discriminated against Mexican-American students." 680 F.2d at 371. It thus held that the district court's conclusions that there were constitutional violations by the State could not stand. *Id.* at 371. The court then held that the § 1703(b) claims fell for the same reasons that the constitutional claims failed. Liability premised on § 1703(b), the court held, "requires proof of action taken with invidious intent." *Id.* at 373.

Examination of the EEOA and its history discloses that the Second Circuit's construction of 20 U.S.C. § 1703(b) is erroneous. The purpose of the EEOA is "to specify appropriate remedies for the orderly removal of the vestiges of the dual school system." 20 U.S.C. § 1701(b). Virtually the entire statute is devoted to limiting the ways in which federal courts may proceed in remedying unlawful discrimination and to identifying

and emphasizing those actions and conditions that *do not* constitute denials of equal educational opportunity. In fact, the only sections of the EEOA that do not specifically limit the availability of aggressive desegregation methods or set forth situations that do not create a need for desegregation are those provisions relating to jurisdiction, standing to bring suit and § 1703. Accordingly, § 1703(b) does not place additional supervisory obligations on state educational agencies.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: Albany, New York
February 14, 2000

Respectfully submitted,

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(2) Supreme Court, U.S.
FILED

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IN THE OFFICE OF THE CLERK

Supreme Court of the United States

October Term, 1999

THE STATE OF NEW YORK; THE BOARD OF REGENTS OF THE STATE OF NEW YORK; CARL T. HAYDEN; J. EDWARD MEYER; R. CARLOS CARBALLADA; ADELAIDE L. SANFORD; DIANE O'NEILL McGIVERN; SAUL B. COHEN; JAMES C. DAWSON; ROBERT M. BENNETT; ROBERT M. JOHNSON; ANTHONY S. BOTTAR; MERRYL H. TISCH; HAROLD O. LEVY; ENA L. FARLEY; GERALDINE CHAPEY; RICARDO OQUENDO; ELEANOR BARTLETT; and ARNOLD GARDNER, in their official capacities as members of the State Board of Regents; DEPARTMENT OF EDUCATION OF THE STATE OF NEW YORK; RICHARD P. MILLS, as Commissioner of Education of the State of New York; URBAN DEVELOPMENT CORPORATION OF THE STATE OF NEW YORK; CHARLES GARGANO as Director of the Urban Development Corporation; GEORGE E. PATAKI, as Governor of the State of New York; and H. CARL McCALL, as Comptroller of the State of New York,

Petitioners,

(Caption continued on inside of cover)

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

APPENDIX

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YONKERS BOARD OF EDUCATION; YONKERS BRANCH-NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE; REGINA RYER, a minor by her mother and next friend, CHARLOTTE RYER, on behalf of themselves, and all individuals similarly situated and the CITY OF YONKERS,

Respondents.

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November 16, 1999
Opinion of the Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 219, 220—August Term, 1998

(Argued: September 9, 1998 Decided: June 22, 1999)

(Petition for Rehearing Filed: July 9, 1999
Decided: November 16, 1999)

Docket Nos. 97-6284, 97-6338

UNITED STATES OF AMERICA,

Plaintiff,

YONKERS BRANCH – NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, REGINA RYER, a minor by her mother, and next friend, and CHARLOTTE RYER, on behalf of themselves, and all individuals similarly situated,

Plaintiffs-Intervenors-Appellees,

—v.—

CITY OF YONKERS and
YONKERS BOARD OF EDUCATION,

Defendants-Appellees,

YONKERS COMMUNITY DEVELOPMENT AGENCY, and U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, Samuel Pierce, Secretary,

Defendants,

THE STATE OF NEW YORK, THE BOARD OF REGENTS OF THE STATE OF NEW YORK, CARL T. HAYDEN, LOUISE P. MATTEONI, JORGE L. BATISTA, EDWARD J. MEYER, R. CARLOS CARBALLADA, ADELAIDE L. SANFORD, DIANE O'NEILL MCGIVERN, SAUL B. COHEN, JAMES C. DAWSON, ROBERT M. BENNET, ROBERT M. JOHNSON, PETER M. PREYOR, ANTHONY S. BOTTAR, MERRYL H. TISCH, HAROLD O. LEVY, ENA L. FARLEY, in their official capacities as members of the State Board of Regents, DEPARTMENT OF EDUCATION OF THE STATE OF NEW YORK, RICHARD P. MILLS, as Commissioner of Education of the State of New York, URBAN DEVELOPMENT CORPORATION OF THE STATE OF NEW YORK, and CHARLES A. GARGANO, as Chairman of the Urban Development Corporation, GEORGE PATAKI, as Governor of the State of New York, and H. CARL MCCALL, as Comptroller of the State of New York,

Defendants-Appellants.

Before:

MCLAUGHLIN, JACOBS, and SACK,

Circuit Judges.

Appeal from judgments of the United States District Court for the Southern District of New York (Sand, *J.*), finding that vestiges of segregation remain in the Yonkers public schools, imposing additional remedies, and apportioning costs among the defendants.

On rehearing, affirmed in part, vacated in part, and remanded. Judge Sack concurs in a separate opinion.

DENISE A. HARTMAN, Assistant Attorney General, Albany, NY (Dennis C. Vacco, Attorney General of the State of New York, Barbara G. Billet, Solicitor General, Peter H. Schiff, Deputy Solicitor General, Nancy A. Spiegel, Assistant Attorney General, on the brief) *for Defendants-Appellants.*

MICHAEL H. SUSSMAN, Goshen, NY (Stephen Bergstein, Law Offices of Michael H. Sussman, on the brief), *for Plaintiffs-Intervenors-Appellees.*

STEPHEN J. ROUTH, Washington, DC (Kevin J. Lanigan, John Borkowski, Carmel Martin, Hogan & Hartson L.L.P., Washington, D.C.; Lawrence W. Thomas, Donoghue, Thomas, Auslander & Drohan, Yonkers, NY, on the brief), *for Defendant-Appellee Yonkers Board of Education.*

RAYMOND P. FITZPATRICK, JR., Birmingham, AL (Fitzpatrick, Cooper & Clark, on the brief), *for Defendant-Appellee City of Yonkers.*

JACOBS, *Circuit Judge*:

In 1996, this Court affirmed findings by the United States District Court for the Southern District of New York (Sand, *J.*) that the State of New York had been aware of de jure segregation by the City of Yonkers in its public schools, and that the State failed to take corrective measures. *See United States v. Yonkers*, 96 F.3d 600, 611 (2d Cir. 1996). At the same time, we held (reversing the district court) that the State could for that reason be liable under the Fourteenth Amendment or the Equal Education Opportunity Act, *see id.* at 619, 621, and remanded for further proceedings. The case now returns to us following the district court's renewed finding that the school system still labors under vestiges of *de jure* segregation, and a judgment embodying a remedy supplemental to one imposed a decade earlier and intended (like the earlier remedy) to eradicate the vestiges of school segregation in Yonkers.

The order appealed from finds two remaining vestiges in the Yonkers schools: (i) low teacher expectations for minority students, and (ii) insufficiently multi-cultural orientation of teaching techniques and curriculum. The remedy includes a requirement that the State contribute $575 million over nine years to help fund various remedial measures.

The defendant State of New York (joined by the defendant City of Yonkers) contests the district court's finding that vestiges of segregation remain in the school system, and on that issue the State is joined by the defendant City of Yonkers. In opposition, plaintiff National Association for the Advancement of Colored People ("the NAACP") argues that the findings are adequately supported by the evidence; on that issue, the NAACP is joined by the defendant Yonkers Board of Education, which would enjoy a large infusion of State fund-

ing if the order is affirmed and reproaches itself for failing to obliterate vestiges of its historical segregation.

The State appeals on the further grounds (i) that the remedy imposed exceeded the district court's authority; (ii) that the cross-claims against it filed by the Yonkers parties (the City and the Board) are barred by the doctrine of municipal incapacity; (iii) that the NAACP lacks standing to litigate the question of how liability is apportioned among the defendants; and (iv) that the district court impermissibly assessed against the State half the annual cost of remedial measures. As to these issues, the City joins the NAACP and the Board in urging affirmance of the remedial orders.

We initially decided this appeal by an opinion filed on June 22, 1999. *See United States v. City of Yonkers*, 181 F.3d 301 (2d Cir. 1999). In that opinion, we ruled *inter alia* that there was insufficient record support for the only two vestiges found by the district court and that the remedy imposed by the district court was unsustainable. We adhere to those conclusions. Our initial opinion also surveyed the record (guided in part by the briefs and arguments of the appellees) concluded that the record could not support alternative findings of vestiges other than the two specified by the district court, and therefore reversed on this point. Subsequently, the NAACP filed a petition for rehearing and suggestion for rehearing in banc. Now, upon further reflection, we are convinced by Judge Sack's view, expressed in his partial dissent to our initial opinion on this appeal, that it is prudent to ask the district court to make further findings on the present record and in light of this opinion as to whether—or not—there are remaining vestiges of segregation in the Yonkers school system, and if so what they are and what record evidence is relied on for support.

To accomplish the remand for that purpose, we grant the petition for rehearing, vacate our prior opinion, decide the appeal by this opinion, remand for a limited purpose, and provide for automatic restoration of appellate jurisdiction without a new notice of appeal. *See United States v. Salameh*, 84 F.3d 47, 50 (2d Cir. 1996); *United States v. Jacobson*, 15 F.3d 19, 22 (2d Cir. 1994).

The remand will entail a prolongation of uncertainty in this already protracted litigation, but we conclude that the delay is worthwhile in order to ensure that we have the full benefit of the district court's views. Depending on whether additional findings are made, and (if made) what they are, the panel may revisit the question as to which party or parties bear the burden of proof. The panel has entered a stay of the order rejected in our initial opinion, which will preserve the status quo ante during the remand for further findings.

In this opinion, we arrive at the following conclusions:

- The district court identified two circumstances as vestiges of segregation. Neither fairly supports the conclusion. The evidence supporting these findings was almost entirely anecdotal, and failed to forge an adequate causal link between the regime of *de jure* segregation and any ongoing remediable deficiency. Likewise, statistical evidence about racial disparities in educational achievement failed to demonstrate that the racial gap was the product of prior segregation, as opposed to, for example, ambient societal racism.

- The remedy imposed by the district court exceeded its broad remedial authority because the remedy constitutes by and large a general school improvement program. The court failed to articulate the required nexus between any ongoing injury caused by unconstitutional conduct and proposed remedial measures.

- As the case is currently structured, we reject the State's arguments on municipal incapacity and standing. Since the State concedes that the NAACP plaintiffs do have standing to litigate the State's liability and the scope of the remedy, the district court has little choice but to apportion costs among the joint tortfeasors.

- Finally, the district court did not exceed its remedial authority in allocating to the State one-half the annual costs of its previously-imposed remedy. At the same time, we leave it to the district court in the first instance to assess the ongoing efficacy and necessity of that remedy.

BACKGROUND

We will assume familiarity with our previous decisions in the case, *see United States v. City of Yonkers*, 96 F.3d 600 (2d Cir. 1996) ("*Yonkers V*"); *United States v. Yonkers Bd. of Educ.*, 837 F.2d 1181 (2d Cir. 1987) ("*Yonkers III*"), and will here emphasize only those facts and circumstances that bear upon the issues presented on this appeal.

In 1980, the United States sued the City of Yonkers, the Yonkers Board of Education, and the Yonkers Community Development agency, alleging housing and school segregation in violation of the Equal Protection Clause and federal civil rights statutes. The NAACP intervened as a plaintiff the following year, and the case was subsequently certified as a class action.

After trial, the district court found that the defendants had committed intentional racial discrimination in housing and in education. *See United States v. Yonkers Bd. of Educ.*, 624 F. Supp. 1276 (S.D.N.Y. 1985) (Sand, *J.*) ("*Yonkers I*"). Specif-

ically, the Board had clung to a neighborhood school policy with full knowledge that its location of subsidized public housing in poorer neighborhoods of the City would be conducive to segregated schools; had manipulated school openings and closings and attendance zones to create and preserve racially identifiable schools; had rejected several reasonable proposals that would have desegregated the student population; had consigned students in predominantly minority schools to inferior facilities and staff; had followed a policy of disproportionately assigning minority teachers and staff to schools with predominately minority student populations; and had assigned minority students disproportionately to special education classes. *See Yonkers III*, 837 F.2d at 1212-14. The district court found that the City was also liable for school segregation because it had pursued a discriminatory housing policy with the intent (in part) to keep racially identifiable schools, and because the mayor's appointments to the Board of Education evinced a desire to continue segregated schools in Yonkers. *See id.* at 1214-15.

A year later, the district court issued its remedial order for the Yonkers schools. *See United States v. Yonkers Bd. of Educ.*, 635 F. Supp. 1538 (S.D.N.Y. 1986) (Sand, *J.*) ("*Yonkers II*"). Its stated goal was to achieve the desegregation of the student population in every school in the system by the 1987-88 school year.[1] The principal tools for achieving that goal were the creation of City-funded magnet programs to attract non-minorities to predominately minority schools and the adoption of a "controlled choice" system for student assignments. *See Yonkers III*, 837 F.2d at 1215. This

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[1] The district court used two standards for determining whether a school was desegregated. For a magnet school, the minority enrollment had to be within 15 percentage points of the system-wide minority population in the first year and within 10 points in all subsequent years. For non-magnet schools, the figure was 20 percentage points. *See Yonkers III*, 837 F.2d at 1215.

remedial order has come to be known as the first Educational Improvement Plan ("EIP I").

We affirmed *Yonkers I* and *Yonkers II* in 1987. *See id.* at 1239.

Under EIP I, the Yonkers schools achieved "enrollment" desegregation during the 1986-87 school year and did so "in a relatively smooth and peaceful manner." *United States v. City of Yonkers*, 833 F. Supp. 214, 216 (S.D.N.Y. 1993) (Sand, *J.*) ("*Yonkers IV*").

In September 1987, the Board of Education sought leave to file a cross claim against the State and numerous state agencies and employees, and the NAACP moved to amend its complaint to name as defendants the same State parties. At roughly the same time, and at the district court's invitation, the Board began formulating a second Educational Improvement Plan ("EIP II").

The state defendants' motions to dismiss and for summary judgment were denied in 1989 and 1992, respectively. *See United States v. City of Yonkers*, No. 80 CIV. 6761(LBS), 1989 WL 88698 (S.D.N.Y. Aug. 1, 1989), *appeal dismissed*, 893 F.2d 498 (2d Cir. 1990); *United States v. City of Yonkers*, No. 80 CIV. 6761 (LBS), 1992 WL 176953 (S.D.N.Y. July 10, 1992). The district court then ordered a trifurcated trial to establish: (1) whether "vestiges" of segregation remained in the Yonkers schools despite EIP I; (2) whether there was a causal relationship between any unconstitutional actions by the State defendants and those vestiges; and (3) what remedy, if any, would be appropriate.

After the first phase of this three-part proceeding, the district court held that vestiges of segregation persisted. Although the district court placed considerable weight on racial disparities in achievement test results, it treated the testing disparities as *evidence* of vestiges but declined to con-

sider them vestiges of segregation in themselves. *See Yonkers IV*, 833 F. Supp. at 222. The court relied on a study prepared by a Board expert that applied multiple regression analysis to students' reading and math scores on the Metropolitan Achievement Test. The study concluded that race was a statistically significant factor in accounting for disparities in performance even after controlling for other possible influences, such as placement in special education, poverty (for which receipt of subsidized lunches was used as a proxy), attendance at schools where many students receive subsidized lunches, and limited English language skills. *See id.* at 221. The district court acknowledged that the study "suffer[ed] from a lack of adequate base data" and that there could be other factors contributing to the disparity in results, such as weight at birth, the educational level of parents, and living in a single-parent household. *Id.* at 221-22. The court did not credit evidence adduced by the State (i) that other urban school districts nationally suffered from the same racial gaps in achievement scores, *see id.* at 223 ("[T]he widespread nature of the problem . . . does not provide an excuse for inaction."); (ii) that the lack of adequate multicultural training was attributable to the staff's "intransigence" rather than a lack of funds, *id.*; and (iii) that ongoing disparities in educational results are attributable to intervening demographic changes rather than to historical segregation, *see id.* at 224-25.

Beginning with "the premise that all children can learn," Judge Sand found that the Board of Education had demonstrated that the test disparities resulted from vestiges of discrimination, and identified two ongoing circumstances as vestiges of segregation resulting in racial disparities in educational quality: (i) low teacher expectations for minority students and (ii) insufficiently multi-cultural curricula and teaching techniques. *See id.* at 222-23.

The State did not appeal the district court's 1993 decision on vestiges because it was the first stage of a trifurcated trial. Although this Court's 1996 opinion ruled on other aspects of the case, it noted that the finding of vestiges was not under review. *See Yonkers V*, 96 F.3d at 604. That matter therefore comes before this Court for the first time in this appeal.

The second phase of the trifurcated litigation is not directly relevant to this appeal. After a trial in 1995, the district court found as facts that the State knew or should have known of the *de jure* segregation in the Yonkers public schools and that it had failed to take action to end it. *See id.* at 604-05. As a matter of law, however, the district court held that the State's omissions could not be the basis of liability for violation of the Fourteenth Amendment or of the Equal Educational Opportunities Act of 1974 ("EEOA"), 20 U.S.C. §§ 1701-1758. In 1996, this Court affirmed the district court's factual findings on the State's acts and omissions but reversed its legal holding, and thereby opened the door to State liability. *See Yonkers V*, 96 F.3d at 611.

With this Court's reinstatement of the case against the State, the district court proceeded in 1997 to the remedial (and final) phase of the trifurcated trial. Four years had passed since the district court's 1993 vestiges ruling, so the court wisely took the opportunity to revisit the question of whether vestiges of segregation persisted.

At trial in 1997, the State offered evidence showing that the achievement disparities in Yonkers were comparable to those in four other New York school districts that had similar demographics but had never been found to have practiced *de jure* segregation. *See United States v. Yonkers Bd. of Educ.*, 984 F. Supp. 687, 690 (S.D.N.Y. 1997) (Sand, *J.*) ("*Yonkers VI*"). The Board of Education countered with (i) an updated version of its 1993 regression analysis; (ii) evidence

of disparities in dropout rates, suspension rates, and rates of assignment to special education classes; and (iii) anecdotal evidence that some Yonkers teachers have low expectations for minority students. *See id.*

The Court rejected the State's data comparing test-score disparities in Yonkers with disparities in comparable districts in the State, noting that those districts could also be suffering from the vestiges of prior discrimination, whether or not *de jure* segregation had been judicially found. *See id.* at 690-91. Without extended discussion, the court "adopt[ed] and reaffirm[ed]" its 1993 vestiges decision. *Id.* at 691.

In the same 1997 decision, the court found that although EIP I had achieved numerical integration of the Yonkers schools, EIP I was insufficient to remedy perceived disparities in education afforded minority students. *See id.* at 691, 694-95. It therefore adopted a set of measures developed by the Yonkers Board of Education, and designated EIP II. *See id.* at 698-99. Those measures, outlined in broad terms in the district court's order, *see id.* at 713- 24, and subject to further refinement, include the following:

- Implementation of State and national curricular standards, in addition to support services and "skills programs" to enable students to succeed in demanding courses.
- Recruitment and training to better enable staff to teach a diverse student body.
- "Information rich classrooms," including networked computers and improved libraries.
- Full-day pre-kindergarten.
- Smaller classes (to be accomplished by hiring more teachers) and smaller school size.

- Improved and expanded educational programs tailored to students for whom English is a second language.
- Programs intended to increase parental involvement in the schools.

See id. at 714-21.

With this end to the trifurcated trial, the district court's judgment became final and appealable. On appeal, the State argues that (1) the evidence of vestiges of prior segregation was legally insufficient; (2) the remedy imposed by the district court was inappropriate; (3) the claims against it should be dismissed on the grounds of municipal incapacity and lack of standing; (4) the district court erred in allocating to the State half the costs of EIP I. The City supports the State in its first ground of appeal but opposes the State on all other issues. The NAACP and the Board of Education oppose all of the State's arguments.

DISCUSSION

A. *Vestiges*

1. Standard of Review

We review a district court's findings of fact in a desegregation case for clear error. *See* Fed. R. Civ. P. 52(a); *Freeman v. Pitts*, 503 U.S. 467, 474, 112 S. Ct. 1430, 1437 (1992). A district court's conclusion that there are legally sufficient vestiges of segregation in a school district, however, is a mixed question of law and fact and as such we subject it to *de novo* review. *See Lopresti v. Terwilliger*, 126 F.3d 34, 39 (2d Cir. 1997).

2. Burden of Persuasion

In our initial opinion on this appeal, we considered the question of which party bears the burden of persuasion as to whether vestiges of segregation remain in the Yonkers schools. *See United States v. City of Yonkers*, 181 F.3d 301, 309-11 (2d Cir. 1999). This question is immaterial to this opinion, which is carefully limited to a review of the findings actually made by the district court and of the record evidence cited by the Board of Education and the NAACP. As discussed below, this evidence is inadequate to support the district court's findings of vestiges regardless of where the burden of persuasion falls.

3. Vestiges

Since the Supreme Court's opinion in *Green*, courts have repeatedly held that the removal of official impediments to student integration is not a complete remedy for *de jure* segregation in schools. "[A] state does not discharge its constitutional obligations until it eradicates policies and practices traceable to its prior *de jure* dual system that continue to foster segregation." *United States v. Fordice*, 505 U.S. 717, 728, 112 S. Ct. 2727, 2735 (1992). It need not be shown that such vestiges have a discriminatory purpose, only that they have a discriminatory effect. *See id.* at 732-33 & n.8, 112 S. Ct. at 2738 & n.8.

To recapitulate, the *Green* court listed six areas in which school districts were required to end racial disparities: student enrollment, faculty, staff, transportation, extracurricular activities, and facilities. *See Green v. County School Board*, 391 U.S. 430, 435, 88 S. Ct. 1689, 1693 (1968); *Swann*, 402 U.S. at 18, 91 S. Ct. at 1277. These *Green* factors are not necessarily the only measures of residual segregative effect, *see Freeman v. Pitts*, 503 U.S. 467, 493, 112 S. Ct. 1430, 1446 (1992), but they are "among the most important

indicia of a segregated system," *Swann*, 402 U.S. at 18, 91 S. Ct. at 1277.

It is undisputed that the Yonkers School Board has achieved full integration as measured by the *Green* factors. The issue now is whether the school system disserves its minority students by delivering the same instruction to all its pupils, and by having some teachers who expect minority children to do less well when so instructed. These quality-of-education factors are not among the indicia listed in *Green*, but other courts have considered quality of education in assessing whether a school system has fully overcome its history of segregation. *See, e.g.*, *Freeman*, 503 U.S. at 492-93, 112 S. Ct. at 1446. We will assume without deciding that disparities in quality of education alone may constitute a vestige of prior segregation. *Cf. Wessmann v. Gittens*, 160 F.3d 790, 801 (1st Cir. 1998).

Before turning to the vestiges identified by the district court, we canvass a number of putative vestiges that are advanced by the Board to support the district court's judgment, but that were not found by the district court.

The Board accuses itself of "within-school segregation." Br. of Appellee Yonkers Bd. of Educ. at 37-39. Specifically, the Board confesses that its employees engage in race-conscious tracking of minority students into less challenging courses, and even segregate students within classrooms. *See id.* If true, these conditions would be alarming.[2] But the district court did not find such practices, or deem

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[2] The Board proffered testimony that, in some classrooms, students of the same race sat in clusters—something that could be attributed to cliques and affinities among students. The Board has floated the idea that these groupings may have been segregative seating assignment by teachers, but counsel for the Board was unable to say at oral argument why, if such an outrageous practice existed, it could not be rectified by Board-imposed discipline or dismissal, without remedial funding from the State.

within-school racial groupings to be a vestige of prior *de jure* segregation.

The Board also cited inadequate facilities, but Judge Sand could find "little or no correlation between the adequacy of a particular school facility and its prior racial identification." *Yonkers IV*, 833 F. Supp. 214, 223 (S.D.N.Y. 1993).

The district court referenced the Board's self-indictment on a number of additional scores, including "the self-esteem and attitudes of students," "the relationships between majority and minority students," and "community perceptions concerning the Yonkers schools." *Id.* at 217. These subjects are not part of our review because the court made no findings on these subjects, and did not treat them as vestiges of segregation. *See id.* at 222-23.

The district court's findings of vestiges of segregation in Yonkers are vague, but we perceive two relevant findings of racial disparity, both of which concern the quality of education: low teacher expectations for minority students, and an insufficiently multi-cultural approach to curriculum and teaching techniques. *See id.* at 222. As the district court acknowledged, the evidence on these matters was "largely anecdotal." *Id.* The court's opinion accords great weight and influence to racial differences in test scores. Although the court ultimately concluded that the disparities themselves are not vestiges of segregation, the testing differences are treated in the opinion as tantamount to vestiges. In this section, we examine in turn the two supposed vestiges and then consider the test score disparity.

(a) *Educational Theory*

Evidence that Yonkers' curriculum and teaching techniques are insufficiently multi-cultural is legally insufficient to constitute a vestige of segregation. Our review is somewhat ham-

pered by the district court's failure to make specific factual findings on the subject, but because we do not want to prolong unnecessarily this already-lengthy litigation, we look to the record ourselves (and specifically to passages highlighted by the Board) rather than remand the case for a further articulation of findings on this particular issue. *See Wessmann*, 160 F.3d at 802.

Dr. Donald Batista, superintendent of the Yonkers public schools, testified that "most" of the teachers in the Yonkers schools were "trained in a segregated system." As a result, "[t]hey are accustomed to ability grouping and dealing with homogeneous classes, and in many respects, they have not been trained to work with more heterogeneous classes, trained in understanding cultural diversity and multi-cultural education."

AnneMarie Ciaramella, director of school improvement in the Yonkers Department of Administration, testified that many Yonkers teachers relied on traditional lecture techniques and were unfamiliar with "cooperative learning" (students learning together in small groups), which technique, she testified, is especially suited to the learning needs of minority students.

Edda Cardona-Zuckerman, a Yonkers principal, testified that teachers who started in the segregated system "were not prepared [and] were a bit overwhelmed" when the ending of segregation dramatically altered the racial and ethnic makeup of their classes. In the same vein, Betsey Hardeman, who was deputy superintendent of schools in Yonkers for two-and-a-half years, noted that "the teaching techniques have changed from when [older teachers] started to teach." She expanded, "there was no cooperative learning back in those days . . . there was not the amount of individualization, there was much more emphasis placed on lecture, there was much more

emphasis placed on the teacher as directing the learning as opposed to teaching students to direct their own learning."

For several reasons, this and other testimony does not furnish an evidentiary basis for a finding of a vestige of prior discrimination.

First, insofar as the testimony depicts the veteran teachers of the segregation era struggling unsuccessfully to cope with a changing student population, it fails to trace their presumed inadequacies to the practices and influences of segregation. For reasons unrelated to segregation or desegregation, the Yonkers school system has undergone dramatic demographic change over the course of this litigation. In 1985, 47% of the student population was black or Hispanic. By 1996, the figure was 71%, and the total student population had grown from under 19,000 to over 23,000. Much of the growth in the minority population was attributable to immigration from Latin America. Assuming that distinct educational strategies are needed to teach children of differing ethnicity and race, the evidence cited by the Board demonstrates that the veteran teachers would have been challenged professionally by the same transitions in teaching methods and theories even if Yonkers had never imposed segregation. *Cf. Missouri v. Jenkins*, 515 U.S. 70, 102, 115 S. Ct. 2038, 2055-56 (1995); *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424, 434-36, 96 S. Ct. 2697, 2704 (1976).

Second, the Board of Education never adequately explains how any deficiencies in multi-cultural teaching techniques on the part of *younger* teachers could be fairly traced to the era of *de jure* segregation—before they started teaching. It is possible that these relatively new teachers received inadequate training, or that the Board is recruiting poor teachers, but neither state of affairs would constitute a vestige of prior segregation. It is not enough to suggest that new teachers are

infected by their hidebound colleagues, and therefore cannot master new techniques. *See Wessmann*, 160 F.3d at 807 ("While the idea of 'socialization' may be intellectually elegant, courts must insist on seeing concrete evidence.").

Third, pedagogical currents shift over time. It cannot be expected that every school district will succeed in continuously retraining its teachers, new and old, to be adept in current techniques. Failure to succeed at such an endeavor can be attributed to many things, but the linkage to long-ended segregation does not hold. The inability or unwillingness of some teachers to pursue strategies such as cooperative learning does not render the school system a constitutional violator. Cooperative learning did not even exist as a methodology when this litigation began, as Hardeman testified.

Fourth, curriculum is a sensitive matter, drawing subjective inputs from education policy, local politics and parental preference. Absent some extraordinary showing, we will not conclude that the Constitution requires a local school board to adopt one curriculum over another, or that children of differing ethnicity and race require separate curricula or teaching techniques. There was no demonstration that those who drafted the curriculum in 1980 acted with racial animus to craft a school program such that children of certain ethnicities or races would fail to learn, or that the curriculum represented anything other than the pedagogical thinking of the time. To cast the curriculum as a vestige of segregation, plaintiffs must show more than that it was adopted in the time of segregation and has since become outmoded. Plaintiffs have failed to show the causal link between *de jure* segregation and the purported vestige.

(b) *Low Expectations*

The district court did not cite specific facts or anecdotes to support its conclusion that low teacher expectations for m inority students constitute a vestige of prior segregation. But the Board's brief on appeal cites several examples, some of which we summarize below.

Jacquilynn Beville, a social worker employed by the Yonkers public schools, testified that in some schools teachers viewed minority students as "deficient because of either coming from another country, being bilingual, or coming from an urban or a poor neighborhood." She also described "a tendency not to see [minority students'] potential for success" but rather to see "their weaknesses . . . and to focus on that, and to teach to that level of performance."

Sylvia A. Muckelvaney, a teacher and "multi-cultural liaison" at a magnet elementary school, said that she had "heard some teachers over the years make the statement that they don't believe that all children can learn and in general they were referring at the time to children of color." She also testified that when visiting colleagues' classrooms to pick up something or have brief conversations, she has "noticed particular things that sort of make you look twice" about the teachers' treatment of minority students.

Hardeman, the former deputy superintendent, observed on "several occasions" a minority student raising his or her hand to answer a question and "the teacher would say, you know, Johnny, put your hand down, you really don't know the answer to that question."

The district court opinion does not describe the causal link between these present-day low expectations and the pre-1986 era of *de jure* segregation. We have reviewed the evidence cited by the Board in support of the proposition that a causal link exists. A few representative examples follow:

Cardona-Zuckerman, a principal, testified that some of the teachers who had been in school system before 1986 "had gotten used to a particular population of children, children who were certainly in the mainstream, who didn't have the degree of problems academically that the rest of the children who later on came in had." Hardeman noted that the demographics of the Yonkers school population had changed dramatically during the tenure of some veteran teachers, and "[t]hey are not prepared to deal with that."

The following exchange took place during examination of Dr. Gladys Pack, a Yonkers administrator:

> [Pack]: . . . [T]he vestiges [are] systemic in nature so that a new teacher coming in without that kind of training with the rest of the teachers and without the changes that need to be made is somewhat—
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> [Counsel]: You view it as a virus, that a new teacher coming in would automatically be affected but the teachers who have been there a long time are you assume to be infected?
>
> [Pack]: I think it's a system that is infected. Is it a kind of virus? Yes.

As these passages illustrate, the evidence that teachers have low expectations of minority students is entirely based on scattered anecdotes, and the evidence supporting a causal link between these low expectations and prior *de jure* segregation is a set of subjective, intuitive impressions. This is not enough. "The vestiges of segregation that are the concern of the law in a school case may be subtle and intangible but nonetheless *they must be so real that they have a causal link to the* de jure *violation being remedied.*" *Freeman v. Pitts*, 503 U.S. 467, 496, 112 S. Ct. 1430, 1448 (1992) (emphasis added); *see also Board of Educ. v. Dowell*, 498 U.S. 237,

246, 111 S. Ct. 630, 636 (1991) (vestiges must be described with sufficient precision so that defendants can have "a rather precise statement of [their] obligations").

The First Circuit recently came to the same conclusion in a case challenging the use of race for admissions to the Boston Latin School. *See Wessmann v. Gittens*, 160 F.3d 790 (1st Cir. 1998). The court concluded that anecdotes of low teacher expectations for minority students are legally insufficient to justify the challenged policy. *See id.* at 806 ("[A]necdotal evidence alone can establish institutional discrimination only in the most exceptional circumstances."). In particular, the court criticized the anecdotal evidence as failing to provide any quantitative proof of the pervasiveness of the purported problem, *see id.* at 806-07; this critique is equally valid in this case (assuming of course that one can quantitatively measure the inaccuracy of teachers' expectations).

It is instructive to consider together the two findings of vestigial segregation made by the district court. The residual effects of segregation are said to be revealed on the one hand by low teacher expectations, and on the other hand by the failure to adopt teaching techniques targeted to minority children. Ciaramella, the director of school improvement, explained that traditional pedagogical approaches (such as lecturing) are inevitably targeted to the middle range of academic ability in a class. Given the "achievement gap" between minority and non-minority children, she said, that means that many minority children's "ability to comprehend, understand and use information is not going to be met at all." It is impossible to see how all vestiges of segregation can be erased if it is contended one vestige is low teacher expectations and the other is the failure of teachers to realize that minority students—presumed to be at the bottom of the class—are not reached by teaching techniques targeted to the

middle. The more one adopts teaching techniques that assume minority students are at the bottom, the more one reinforces the idea of low expectations. This reciprocal effect would assure that the taint of segregation could never be purged. And it is clear enough that the Board has no incentive to rid itself of that taint so long as its self-accusation generates a flow of state remedial funds through this litigation.

(c) *Test Scores*

The district court found the regression analysis on racial disparities in achievement test scores (introduced at the 1993 vestiges trial) to be highly significant. Although the court expressly declined to consider the disparities as vestiges in themselves, it deemed them "consequences" of vestiges, *see Yonkers IV*, 833 F. Supp. 214, 222 (S.D.N.Y. 1993), and placed heavy emphasis on them. Thus, the court observed that the Board's "burden of showing that these achievement disparities result from vestiges of segregation is not a heavy one." *Id.* (footnote omitted).

As other courts have recognized, using achievement test scores as a measure, either direct or indirect, of a school system's movement away from segregation is deeply problematic. *See, e.g.*, *Missouri v. Jenkins*, 515 U.S. 70, 101, 115 S. Ct. 2038, 2055 (1995); *People Who Care v. Rockford Bd. of Educ.*, 111 F.3d 528, 537 (7th Cir. 1997); *Coalition to Save Our Children v. State Bd. of Educ.*, 90 F.3d 752, 776-78 (3d Cir. 1996). True, the study examining test results in Yonkers was more sophisticated than studies that some other appellate courts have found insufficient. In an effort to isolate race as an explanatory factor, the study controlled for some other possible factors, including enrollment in special education, level of English ability, prior test scores, receipt of subsidized or free lunch (a crude proxy for socio-economic status), and attendance at schools with a high concentration of

children receiving a subsidized or free lunch. *See Yonkers IV*, 833 F. Supp. at 221. As the district court acknowledged, however, the study failed to control for several other factors that could explain some or all of the gap, including "birth weight, educational and occupational background of parents, parental interest and involvement, single parent status, . . . mobility and other socio-economic factors." *Id.* at 222. Without taking account of such factors, which describe profound childhood influences, the study's conclusion that there is a purely racial achievement gap in Yonkers strikes us as result-driven. *Cf. Wessmann*, 160 F.3d at 802 ("[W]hether past discrimination necessitates current action is a fact-sensitive inquiry, and courts must pay careful attention to competing explanations for current realities.").

The district court nevertheless chose to credit the study's conclusion, and we need not decide whether that reliance was clear error, because there is a deeper problem with the use of the study. The study itself shows only differential achievement levels by race; it does not purport to take the next step and give reasons for that gap. Accepting arguendo the study's conclusion of a racial disparity, the study fails to show that the disparity was caused by pre-1986 segregation in Yonkers, as opposed to, for example, generalized "societal discrimination." *Wessmann*, 160 F.3d at 803-04; *see also Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 22, 91 S. Ct. 1267, 1279 (1971) ("The elimination of racial discrimination in public schools is a large task and one that should not be retarded by efforts to achieve broader purposes lying beyond the jurisdiction of school authorities. One vehicle can carry only a limited amount of baggage.").

The State introduced unrefuted evidence at the 1997 trial showing that the racial disparities in Yonkers were no greater (and in many instances smaller) than those present in comparable New York school districts, districts in which there

has never been a finding of *de jure* segregation. The district court rejected those comparisons on the ground that *de jure* segregation may have existed in the control districts even if it escaped adjudication. *See Yonkers VI*, 984 F. Supp. 687, 690-91 (S.D.N.Y. 1997). That is of course possible. But the district court's approach would invalidate reality-checking comparisons with any and all other districts. The burden of proof comes into play at this juncture. If (as is the case) the Yonkers Board cannot demonstrate salient differences between its experience with changing school demographics and the experience of other school districts, there is no reason to attribute the Yonkers experience to circumstances particular to Yonkers and its history of segregation.

In short, a finding of prior segregation, coupled with a finding of present day racial differences in educational achievement, is an insufficient positive test for the presence of residual segregative effects. *See Wessmann*, 160 F.3d at 801.

B. Remedy

The Supreme Court has listed three principles that guide a court's exercise of remedial powers in a school desegregation case. First, "the nature of the desegregation remedy is to be determined by the nature and scope of the constitutional violation." *Milliken v. Bradley*, 433 U.S. 267, 280, 97 S. Ct. 2749, 2757 (1977); *see also Yonkers III*, 837 F.2d 1181, 1235 (2d Cir. 1987) ("[T]he court should tailor the remedy to fit the nature and extent of the violation."). Second, the desegregation decree "must indeed be remedial in nature, that is, it must be designed as nearly as possible 'to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct.' " *Milliken*, 433 U.S. at 280, 97 S. Ct. at 2757 (quoting *Milliken v. Bradley*, 418 U.S. 717, 746, 94 S. Ct. 3112, 3128 (1974)).

Finally, the court "must take into account the interests of state and local authorities in managing their own affairs, consistent with the Constitution." *Id.* at 280-81, 97 S. Ct. at 2757.

To satisfy the last of these three principles of discretion requires that any remedial order contemplate "limits to the duration of the District Court's involvement." *Jenkins*, 515 U.S. at 99, 115 S. Ct. at 2054. An open-ended remedial regime, in combination with a potentially collusive alignment of parties, can create a troubling dynamic:

> Each additional program ordered by the District Court—and financed by the State— . . . makes the [local school district] more and more dependent on additional funding from the State; in turn, the greater the [district's] dependence on state funding, the greater its reliance on continued supervision by the District Court.

Id. This incentive effect runs counter to the "vital national tradition" of autonomous local school districts and to the directive that a "district court must strive to restore state and local authorities to the control of a school system operating in compliance with the Constitution." *Id.*

We need not conduct an exhaustive review of the EIP II remedy ordered by the district court in this case; it will doubtless be revisited in light of our reversal on the finding of vestiges. Moreover, since we have found that the record presents insufficient evidence of the two constitutional violations or vestiges of a previous violation found by the district court, we cannot assess whether the remedy is correctly tailored. But the open-ended nature of the remedy imposed here reinforces our conclusion that the existence of vestiges of segregation has been inadequately demonstrated **as to these matters**. Maybe EIP II includes valuable educational components and effectively remedies the ills of the school

system; maybe it does not. But there has been no adequate showing that it is responsive to the only ill that counts for purposes of this litigation: *de jure* segregation and its after-effects. Measures such as networked computers in classrooms and full-day pre-kindergarten are more properly characterized as general educational enrichments rather than remedies for prior segregation. *See Swann*, 402 U.S. at 16, 91 S. Ct. at 1276 ("Remedial judicial authority does not put judges automatically in the shoes of school authorities whose powers are plenary. Judicial authority enters only when local authority defaults."). Desegregation remedies that include enhanced funding may yield incidental benefits, enrichments and amenities. But the animating purpose of desegregation remedies must always be to put the victims of constitutional injury where they would have been but for the injury. *See Milliken*, 433 U.S. at 280, 97 S. Ct. at 2757. Absent a focused identification by the district court of what vestiges of segregation persist in Yonkers, and an explanation of how each individual remedial component is tailored to respond to one or another of those vestiges, we can only conclude that the sweeping remedy imposed here exceeded the admittedly broad power of the district court.

C. Capacity and Standing

The State argues that because of the doctrine of municipal incapacity, its political subdivisions—the Yonkers parties—cannot press their cross-claim against the State. *See generally Kelley v. Metropolitan County Bd. of Educ.*, 836 F.2d 986, 988 (6th Cir. 1987). In a related argument, the State contends that the NAACP lacks standing to litigate how remedial funding is allocated between the State and the local defendants. *See generally DeKalb County School Dist. v. Schrenko*, 109 F.3d 680, 688-89, 693 (11th Cir. 1997). These are questions of law that we review *de novo*. *See Fund for Animals v.*

Babbitt, 89 F.3d 128, 132 (2d Cir. 1996). We must briefly address the State's municipal incapacity and standing arguments because they are necessary predicates to the State's challenge to the allocation of funding responsibility for EIP I between the State and City.

Although we reject the State's arguments now, we reach no conclusion as to whether they may take on force in any further stage of the litigation, such as claims in the nature of contribution after unitary status has been achieved and declared.

1. Waiver

The Board argues that the State has waived its municipal incapacity defense, and relies on Fed. R. Civ. P. 9(a), which requires parties raising a defense involving "the capacity of any party to sue" to do so by pleading in a "specific negative averment." We will assume without deciding that a party waives a capacity defense if the party fails to raise it within the contemplation of Rule 9. *See* 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1295, at 574-75 (2d ed. 1990). Likewise, we will assume without deciding that the State's municipal incapacity defense comes within the scope of Rule 9.

The State did not specifically raise its incapacity defense in its answer to the Board of Education's cross-claim. It did, however, include such an averment in its answer to the City's later cross-claim. Therefore, even if the Board's waiver argument is correct, we would still have to reach the merits of the incapacity claim. In a case in which the funding questions are all interrelated, it would make little sense for us to evaluate this defense as against the City but not as against the Board. We will therefore go to the merits.

2. Merits of the Defenses

We start with the State's concession in this case that the NAACP has standing to "litigate the State's liability and the scope of the remedy." Br. of Appellant State of New York at 81. It follows that even if the State prevailed on its claims as to Yonkers' incapacity and the NAACP's lack of standing on apportionment, (1) the State would remain a properly joined defendant; (2) the State would remain an adjudicated constitutional tortfeasor in a case as to which (3) no declaration of unitary status has found that the constitutional injuries flowing from segregation has been fully redressed; and (4) the State would remain subject to the remedial authority of the district court. The State has failed to explain how, in light of its concession, the district court could avoid apportioning liability in some way between the State and the local defendants. *See Alberti v. Sheriff of Harris County*, 937 F.2d 984, 1001 n.8 (5th Cir. 1991). It would make little sense for the district court to have this authority to allocate responsibility, yet bar the parties from having a say about it.

A number of institutional reform cases have implemented apportionment of liability between states and their subdivisions. *See, e.g., Milliken v. Bradley*, 433 U.S. at 291, 97 S. Ct. at 2762-63 (finding no violation of "principles of federalism" when district court ordered state defendants to bear half the costs of desegregation remedies); *Benjamin v. Malcolm*, 803 F.2d 46, 54 (2d Cir. 1986) (finding City of New York possessed standing to bring cross-claim for injunctive relief against State when State's refusal to accept transfer of sufficient number of prisoners had led to unconstitutional conditions in City prisons). True, these cases do not address the precise incapacity and standing issues now raised by the State. But having raised these issues, the State has failed to articulate how the district court should proceed were the State to prevail on them, or why the NAACP should not be

heard on the apportionment issue (in light of the State's concession), or what difference it makes if Yonkers is heard as well.

Our rejection of the State's arguments concerning incapacity and standing is limited to the case as it is currently structured, in which there is an equitable action with joint tortfeasors, ongoing prospective relief, and no finding that the constitutional injuries have been redressed. It is this last factor that distinguishes this case from *Schrenko*, on which the State relies in advancing its standing argument. In that case, the school district at issue had been deemed unitary, meaning that all injuries had been remedied. *See Schrenko*, 109 F.3d at 692. With the case in that posture, the individual plaintiffs of course lacked standing to litigate what was essentially a contribution claim between defendants. *See id.* at 689.

D. Apportionment of Costs

Having rejected the State's municipal incapacity and standing arguments for the time being, we proceed to the merits of its objections to the district court's funding orders. The State's principal objection is to the requirement that it be required to share equally in the annual costs of EIP I. The State contends that the district court should apportion liability by degree of fault, a method that would reduce the State's share significantly.

The district court has broad equitable discretion to apportion remedial costs among joint tortfeasors. *See Milliken*, 433 U.S. at 288-91, 97 S. Ct. at 2761-63 (affirming district court's conclusion that half the remedial costs for desegregation of Detroit schools be paid by the state of Michigan). In apportioning costs, courts will assess both ability to pay and relative degrees of fault, but the overriding concern is that the remedy be fully funded. *See Green v. County School*

Bd., 391 U.S. 430, 439, 88 S. Ct. 1689, 1694 (1968) (desegregation remedy must "promise[ ] realistically to work, and . . . realistically to work *now*"). The district court found that the City and State were equally responsible for segregation in Yonkers, and that the sharing formula assessed a "fair and proportionate" burden on the levels of government, given their ability to pay.

We cannot say that the court's factual findings about degree of fault are clearly erroneous or that it abused its broad remedial discretion in apportioning compliance costs in this manner.

A related issue is the State's argument that it makes a substantial annual contribution through magnet school aid (as the State does in other large school districts), and that any required State contribution to EIP I should be offset by the magnet school contribution, which has a remedial tendency and purpose. The district court refused to reduce the state's liability for EIP I by the amount of magnet aid, a decision the State argues is unfair and an unwarranted intrusion into state sovereignty. We conclude that it was not an abuse of the court's broad discretion to deny the State credit for payments it has already made to Yonkers through magnet school grants. In making its decision, the Court did not re-characterize the subjective intent of the legislature, as the State argues, but instead determined that this money did not have the effect of funding the ordered remedy. We do not find that conclusion to be clearly erroneous.

CONCLUSION

The district court's remedial order EIP II is vacated. The district court's order apportioning costs for EIP I equally between the State and Yonkers is affirmed. We remand to the district court for the limited purpose of eliciting further find-

ings on the present record as to whether or not vestiges of segregation persist in the Yonkers schools. If there are, the district court should express such findings and if they warrant, fashion an order of relief. The mandate shall issue forthwith. Jurisdiction will be restored to this Court without a new notice of appeal when any of the parties furnishes a copy of the district court's ruling on remand to the clerk of this Court. The case shall be referred to this panel upon its return to this Court's jurisdiction. At that time, the Court will determine whether *and to what extent* further briefing will be needed. After any further order by this Court, the parties will be afforded a renewed opportunity to seek rehearing and rehearing in banc.

SACK, *Circuit Judge* (concurring in the judgment):

I concur in the judgment of the Court for the reasons stated in my partial dissent from the earlier panel opinion on this appeal, *United States v. City of Yonkers*, 181 F.3d 301, 321-30 (2d Cir. 1999).[1]

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[1] I except footnote 7 on burden of proof, 181 F.3d at 327 n.7, an issue no longer addressed by the panel's majority opinion.

February 10, 1998
Order and Judgment of the District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

YONKERS BRANCH - NAACP, et al.,

Plaintiffs-Intervenors,

v 80 CIV 6761 (LBS)

YONKERS BOARD OF EDUCATION, et al.,

Defendants.

ORDER JUDGMENT

On October 8,1997, this Court filed its Opinion which, in relevant part, approved all of the recommendations contained in the Monitor's Advisory Opinion dated August 14, 1997. On December 2, 1997, this Court entered an Order which provided, in relevant part:

> Judgment shall be entered against the State defendants to reimburse the City of Yonkers for its pro-rata share of 1996-97 EIP I costs. Such judgment shall be in the amount of $9 million, subject to the Court Monitor's confirmation of actual expenditures to the Court by December 31, 1997. The Court shall, thereafter, enter a judgment upon the State with payment to be made within thirty (30) days subsequent to entry or by April 1, 1998 whichever date is later.

As directed in the Court's Order, the Monitor delivered the Monitor's Confirmation of 1996-97 EIP I Expenditure Burden to be Assumed by the State of New York, dated December 30, 1997. The Monitor's Confirmation recommended entry of a judgment in the amount of $9,855,504.00.

The State Defendants' Responses to Education Monitor's Recommendation For Confirmation of State's 1996-97 EIP I Expenditure Burden ("State Response") was served on January 26, 1998. State defendants represent in the State Responses that "the State defendants are agreeable to paying the $9.8 million upon entry of a judgment explicitly allowing entry of an order of adjustment of the amount at a later date upon agreement among the parties, on resolution by the Monitor or Court, if necessary." State Responses at 3. At the Monitor's meeting on January 29, 1998, the Monitor confirmed the foregoing representation and scheduled the State defendants' objections for hearing on March 19, 1998. The parties and Monitor further agreed that , in the event any of the State defendants' contentions are ultimately sustained, the party(s) paying the judgment amount would be entitled to appropriate adjustment or credit against any future payments ordered by the Court.

It is therefore, ORDERED that :

1. Judgment is **hereby** (LS) entered in favor of the City of Yonkers against the State Defendants[1] in the amount of $9,855,504.00.

---

[1] The State Defendants are the State of New York; The Board of Regents of the State of New York; Carl T. Hayden, Louise P. Matteoni, Jorge L. Batista, Edward J. Meyer, R. Carlos Carballada, Adelaide L. Sanford, Diane O'Neill McGivern, Saul B. Cohen, James C. Dawson, Robert M. Bennet, Robert M. Johnson, Peter M. Preyor, Anthony S. Bottar, Merryl H. Tisch, Harold O. Levy, and Ena L. Farley, in their official capacities as members of the State Board of Regents; Department of Education of the State of New York; and Richard P. Mills, as Commissioner of Education of the State of New York.

2. The judgment shall bear interest from **April 1, 1998** (LS).

3. The judgment amount shall be paid directly to the City of Yonkers and must be received by its Commissioner of Finance on or before April 1, 1998.

4. In the event any of the contentions of the State defendants in the State Response are sustained, the Court will enter an appropriate Order making an adjustment or otherwise provide credit against any future payments ordered by the Court.

Dated: February 10, 1998
New York, New York

SO ORDERED:

s/ LEONARD B. SAND
Leonard B. Sand
United States District Judge

October 8, 1997
Opinion of the District Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

UNITED STATES OF AMERICA,

Plaintiff,

and

OPINION

YONKERS BRANCH - NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, et al.,

Plaintiff-Intervenors,

80 Civ. 6761 (LBS)

-against-

YONKERS BOARD OF EDUCATION, et al.,

Defendants.

----------x

October 8, 1997

HONORABLE LEONARD B. SAND, U.S.D.J.

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SAND, D.J.

This Opinion and the Order entered this date address and resolve all of the matters relating to the Yonkers Public Schools ("YPS") submitted to this Court following the remand of this case by the Court of Appeals for the Second Circuit. See United States v. City of Yonkers, 96 F.3d 600 (2d Cir. 1996).[1]

I. Liability (Vestiges)

With respect to issues relating to State[2] liability for contributing to the segregation of the Yonkers Public Schools, the State sought to introduce evidence only on the issue of whether vestiges of segregation, which in 1993 this Court found to remain in the Yonkers Public School System, United States v. City of Yonkers, 833 F. Supp. 214 (S.D.N.Y. 1993) ("Vestiges Decision"), continue to be found in that system. (See Tr. Tel Conference of 9/22/97, at 4.)

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[1] The City of Yonkers and the NAACP have also raised issues relating to State and U.D.C. liability for implementing this Court's Housing Remedy Order. For the reasons set forth infra at pp. 13-16, issues relating to a Housing Remedy Order will be deferred pending further submissions by the parties.

[2] For the purposes of this Opinion and the annexed Order, unless the context indicates otherwise, the term "State" encompasses the following defendants: The State of New York; The Board of Regents of the State of New York; Carl T. Hayden; Louise P. Matteoni; Jorge L. Batista; Edward J. Meyer; R. Carlos Carballada; Adelaide L. Sanford; Diane O'Neill McGivern; Saul B. Cohen; James C. Dawson; Robert M. Bennet; Robert M. Johnson; Peter M. Preyor; Anthony S. Bottar; Merryl H. Tisch; Harold O. Levy; and Ena L. Farley, in their official capacities as members of the State Board of Regents; Department of Education of the State of New York; and Richard P. Mills, as Commissioner of Education of the State of New York.

A. Background

In an opinion dated August 30, 1993, we wrote:

> (1) We find that vestiges of segregation remain in the Yonkers Public School system.
>
> (2) We find that many steps are being taken to address these vestiges including teacher training programs, utilization of innovative teaching techniques devised and tested elsewhere, efforts to increase parental involvement, development of magnet school programs, and similar efforts.
>
> (3) We find that the steps being taken in (2) above are inadequate to eradicate vestiges of segregation "root and branch" and must be expanded and implemented in a manner which of necessity will entail the expenditure of additional funds. Not only must teaching techniques and curriculum be reexamined and redesigned to meet these needs, but the physical condition of the YPS must be restored and enhanced if a desegregation program which relies primarily on voluntary selection of magnet schools is to retain its accomplishments to date and attain its ultimate goal of a truly unitary school system.

833 F.Supp. at 225.

The Court did not at that time address "any questions relating to the State's liability for the existence of these conditions nor any questions relating to the relative responsibility of the City and State." Id.

Since the Vestiges Decision, issues as to the liability of the State were addressed by this Court and by the Court of Appeals which, in an opinion dated September 23, 1996, vacated our

dismissal of claims against the State defendants and U.D.C. and remanded to this Court for further proceedings. See 96 F.3d 600.

We see no need to restate the reasoning or conclusions of our Vestiges Decision, full familiarity with which we assume. But that opinion is now over four years old, changes in the demography of the Yonkers school system have occurred (most notably an accelerated influx of Hispanic students, many with limited English proficiency, and the hiring of significant numbers of new teachers), and efforts to address vestiges have been ongoing. Therefore, the question of whether vestiges of segregation still exist in the Yonkers Public School System is one which the State was entirely within its rights to raise. The Court permitted the State to conduct discovery on this question and it has now been tried to this Court.

B. The Trial

The State's claim that vestiges of segregation have been eradicated was supported by the introduction into evidence of ten depositions and the testimony of Dr. Theresa Bucci. The thrust of this evidence and of the State's claims are that gaps in achievement scores between minority and majority students may be caused by conditions other than vestiges; that the written evaluations of Yonkers teachers by their superiors do not indicate that there is widespread dissatisfaction with teacher attitudes and proficiency, that certain remedial measures are in effect and are meeting with a degree of success and that the existence of a gap between minority and majority achievement levels is not unique to Yonkers.

This last contention was based on a comparison by way of graph depicting the level of majority and minority test results in Yonkers and four other school districts in New York State. (See Trial Ex. A (Streeter Aff.).) These four other districts - - Freeport, New York City, New York City Community School

Districts 15 and 28 - - were selected by the State because they had overall enrollments of majority and minority students said to parallel those in Yonkers. The thrust of the State's claim was that disparities among the three racial/ethnic groups (Afro-American, Hispanic and non-minority) in terms of the proportion of students in each group who fail to meet the State Reference Point on State mandated Pupil Evaluation Program ("PEP") tests at the third and sixth grade levels was approximately the same in Yonkers and the four districts to which it was compared.

The Yonkers Board of Education ("YBE") countered these claims by updating the evidence which it had presented in the 1993 procedure to demonstrate that standard test results of majority, Black and Hispanic students conducted since 1993 showed a continuation of the gap reflecting lower minority achievement. Disproportionate suspension rates, retentions, dropouts and referrals to special education have also continued to date. As to claims that achievement results may be impacted by factors other than vestiges, the YBE noted that the state had made no effort to overcome the multiple regression analysis utilized in the 1993 proceedings which this Court found demonstrated that race is a statistically significant factor in accounting for the disparity in reading and math scores "even after factoring out other possible causes." 833 F. Supp. at 221.

Testimony introduced by the YBE also reflected the perception of Yonkers school principals and other supervisory personnel that some teachers' attitudes and expectations still too often reflect past stereotypes, e.g., some teachers calling more frequently on majority students seated in the center of the class while giving less attention to minority students.

C. Findings as to Vestiges

The parties are in disagreement with respect to which party has the burden of proof as to the continuation of vestiges. This

Court has previously opined that in light of the procedural posture of this case the State bears this burden. We find, however, that it is not necessary to resolve this question because we find that the YBE has clearly demonstrated by a strong preponderance of the evidence that vestiges of segregation currently exist in the Yonkers Public School system. Although staff development programs and other remedial measures are attempting to address these problems, the evidence introduced by the YBE supports the conclusion that vestiges of segregation "root and branch" have not been eradicated.

The fact that lower achievement scores for minority students was a phenomenon present in school districts other than Yonkers was specifically recognized in our 1993 Vestiges Opinion, 833 F. Supp. at 223, and does not alter the conclusions reached in that Opinion. The State offered no evidence which would make more meaningful a comparison between Yonkers and the four other districts whose test results were cited by the State. One does not know, for example, the extent, if at all, the other districts themselves suffer the vestiges of past segregation regardless of whether or not they were subject to a court decree. One does not know what a multiple regression analysis, which this Court relied on in its 1993 Vestiges determination, would disclose if applied to the raw data proffered as to the four other districts.

In sum, we adopt and reaffirm the findings and conclusions of our Vestiges Decision. While remedial measures have been adopted on a limited scale because of funding constraints, they have not been adequate to eradicate vestiges of segregation.

Further, we find that a casual relationship exists between the conduct of the State as reflected in the findings of fact continued in our prior decision on State liability, which findings of fact were affirmed by the Court of Appeals, 96 F.3d 600, and the existence of vestiges of segregation in the YPS. The continuing

vestiges of segregation in the YPS are traceable to the prior dual school system that was established and maintained in substantial part by acts or omissions of the State. The State is, therefore, liable for eliminating segregation and its vestiges in YPS and therefore must fund a remedy to accomplish that goal.

II. The EEOA Claims

Following the remand of the Court of Appeals, we have considered whether the denial of equal educational opportunities may be remedied by a method or combination of methods that does not include busing. See 96 F.3d at 621. Although the making of such a finding may present significant problems in some contexts, it is clear to this Court, writing eleven years after initial adoption of a remedy order vis-a-vis the City and YBE and having the benefit of the experience of the intervening years, that busing was and remains an essential component of the remedy order. As we noted in our Vestiges Decision the swift "smooth and peaceful" desegregation which took place in the YPS within less than a year of the issuance of the initial remedy order (Educational Improvement Plan I ("EIP I")), "was brought about by instituting a voluntary magnet school program, including procedures for school selection by parents, busing and other similar measures." 833 F. Supp. at 216. No one familiar with the history of the YPS can seriously argue that busing was not a critical component of EIP I when it was adopted in 1986 and remains so today. In fashioning a remedy order hereunder, the Court proceeded in the light of this finding.

The Court finds, pursuant to 20 U.S.C. § 1712, that the remedy called for in this Opinion and the Order seeks to impose and imposes only such remedies as are essential to correct particular demands of equal educational opportunity and equal protection of the laws. See 20 U.S.C. § 1712 (1988). Indeed, as noted herein, the EIP II provisions are specifically crafted to deal with vestiges of segregation remaining in the YPS.

We set forth in the margin the test of 20 U.S.C. § 1713[3]

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[3] The statute provides as follows:

§ 1713. Priority of remedies

In formulating a remedy for a denial of equal educational opportunity or a denial of the equal protection of the laws, which may involve directly or indirectly the transportation of students, a court, department, or agency of the United States shall consider and make specific findings on the efficacy in correcting such denial of the following remedies and shall require implementation of the first of the remedies set out below, or of the first combination thereof which would remedy such denial:

(a) assigning students to the schools closest to their places of residence which provide the appropriate grade level and type of education for such students, taking into account school capacities and natural physical barriers;

(b) assigning students to the schools closest to their places of residence which provide the appropriate grade level and type of education for such students, taking into account only school capacities;

(c) permitting students to transfer from a school in which a majority of the students are of their race, color, or national origin to a school in which a minority of students are of their race, color, or national origin;

(d) the creation or revision of attendance zones or grade structures without requiring transportation beyond that described in section 1714 of this title;

(e) the construction of new schools or the closing of inferior schools;

(f) the construction or establishment of magnet schools; or

(g) the development and implementation of any other plan which is educationally sound and administratively feasible, subject to the provisions of sections 1714 and 1715 of this title.

which provides that in adopting any remedy pursuant to the EEOA which may involve directly or indirectly the transportation of students, a court shall consider and make specific findings on the efficacy in correcting such denial of the enumerated remedies and calls for a prioritization of such remedies.

Although the YBE contends that § 1713 is inapplicable since it does not directly involve the transportation of students, (YBE's Proposed Findings of Fact at 59), the Court finds that it indirectly involves such transportation since it seeks to implement earlier Court orders which do call for student transportation. However, § 1713 provides no impediment to the Order entered herewith because the Court further finds that the remedies set forth in §§ 1713(a)-(e), have been utilized to the extent practicable in the YPS and that implementation of such remedies alone without the further provisions of EIP I and EIP II would not be efficacious in correcting the denials of equal educational opportunity and equal protection present in this case. Moreover, EIP II has been voluntarily proposed by the YBE, the appropriate educational agency pursuant to 20 U.S.C. § 1716. Whatever contrary views as to the voluntary nature of the YBE's plans this Court previously entertained, See 888 F. Supp. 591, 595 n.7 (S.D.N.Y. 1995), are inapposite in the present posture of these proceedings.

Recognizing that the Court of Appeals already determined that the EEOA is applicable and would subject the State to liability with respect to vestiges of segregation, 96 F.2d at 619-21, the State urges that this question

> should be revisited in light of the Supreme Court's subsequent decision in City of Boerne v. P.F. Flores, 117 S. Ct. 2157 (June 25, 1997), explicating the limits of Congressional enforcement powers under § 5 of the Fourteenth

> Amendment, and the EEOA should be declared unconstitutional and invalid.

(State Defs.' Proposed Findings of Fact at 38.)

The State argues that Boerne stands for the proposition that Congress has not been empowered by § 5 of the Fourteenth Amendment to "making a substantive change in the governing law,"[4] and that the EEOA alters substantial law by doing away with the intent element which must be shown to substantiate an equal protection claim. Further, the State contends that in adopting the EEOA "Congress altered the substance of constitutional law by imposing this absolute, vicarious supervisory liability on each state without regard to the relationship established by each state itself between that state, its officials, and local educational authorities." (State Defs.' Proposed Findings of Fact at 42.)

The Court finds the claim that EEOA is unconstitutional to be without merit. Boerne involved an attempt by Congress in the Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb et seq., to overturn a Supreme Court decision relating to the tests to be applied in determining the constitutionality of generally applicable laws said to impinge on religious practices. The EEOA was adopted pursuant to a Congressional declaration of policy (§ 1701) and pursuant to Congressional finding (§ 1702) to address the subject of transportation of students in light of the failure of the courts to establish clear and uniform standards. Unlike Boerne which was designed to reverse a specific Supreme Court determination, Congress in the EEOA was deferential to the courts stating "that the provisions of this chapter are not intended to modify or diminish the authority of the courts of the

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[4] See City of Boerne v. P.F. Flores, __ U.S. __, 117 S. Ct. 2157, 2164, 138 L. Ed. 2d 624 (1997).

United States to enforce fully the fifth and fourteenth amendments to the Constitution of the United States." 20 U.S.C. § 1702(b).

The Court finds no basis for the claim that EEOA is unconstitutional as contended by the State. (State Defs.' Proposed Findings of Fact at 46).

The State asks that the Court also revisit the determination that it is subject to suit under title VI. 880 F. Supp. at 232-33. The Court of Appeals did not address this issue and we saw no reason to disturb our prior conclusions.

III. Housing Issues

There are three respects in which housing related issues impact on the presence of vestiges in the YPS and steps for their eradication.

A. School Remedy vis-a-vis the State

The facts establishing the State's knowledge that the U.D.C. was building housing in Yonkers which perpetuated and exacerbated the pattern of racial segregation in Yonkers have been fully established in prior proceedings See, e.g., 96 F.3d at 608. The interrelationship between housing and school segregation has also been adequately demonstrated. In concluding that the State is liable for vestiges of segregation in the YPS and in formulating a further school remedy order vis-a-vis the State, no further proceedings or findings are required. Indeed, the YBE advances no proposals specifically directed at housing issues.

B. Housing Remedy vis-a-vis the State

The City has filed an offer of proof seeking to introduce evidence concerning the status of the housing remedy order now

in place and the need for State funding to implement the creation of integrative housing opportunities in Yonkers. The City's proposed order would call upon the U.D.C. to submit for consideration "a plan for the provision of resources to further completion of the requirements of the Housing Remedy Order." (Def. City of Yonkers' Post-Hr'g Mem. at 25.) The City agreed, however, with the suggestion of the Court that the issue of a housing remedy order directed to the State be deferred so as not to delay entry of a school remedy order. (Id.) The time exigencies with respect to a school remedy, i.e., the need for immediate action if corrective measures are to be in place for the next school year, and the issues discussed below, have led this Court to go forward with a school remedy order while briefly holding housing remedy order issues in abeyance pending further submissions by the parties.

C. Housing Remedy vis-a-vis U.D.C.

The Court of Appeals reversed the Court's dismissal of this case as against the U.D.C. holding that its conduct rendered it liable and remanded for a redetermination of whether the U.D.C.'s conduct constituted a "continuing wrong" so that the action against the U.D.C. was not barred by the statute of limitations. The NAACP, which brought the action against the U.D.C., urges this Court to find that the U.D.C. remains liable and proposes an order which would require the U.D.C. within sixty days to submit a plan "which will assist in the creation of affordable housing in areas outside those of minority concentration." (NAACP's Post-Hr'g Mem. at 15.)

With respect to items B. and C. above, the Court finds that it needs more input from the parties. Some of the issues which the Court wishes to explore, touching upon both liability and remedy, are the following:

(1.) As to the U.D.C., what was its status after 1973 and is its present status? What resources, fiscal and otherwise are available to the U.D.C. today? If a final monetary judgment is entered against the U.D.C., from what funds is the judgment paid?[5]

(2.) As a result of years of agonized efforts there is in place a housing remedy order which is in the process of implementation. The day to day administration of this remedy order has been largely turned over, at its request, to the City with a diminishing degree of oversight by the Court appointed Housing Monitor. To what extent if any do the proponents of a housing remedy order, embodying State or U.D.C. participation, envisage a reopening of this order?

The Court will initiate a telephone conference among all of the parties as early as possible to establish a schedule for further inquiry into housing remedy issues.

IV. Remedy

A. EIP I

Questions concerning the provision of a remedy to eradicate vestiges of segregation center on two Education Improvement Plans. EIP I is embodied in this Court's initial School Remedy

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[5] The State begins to address this issue in its Reply Memorandum as follows:

> Because the UDC was taken out of the housing business, it would not have funds available for new housing activities and it would not have staff with the expertise necessary to plan housing activities. The proposal that UDC should now plan housing assistance is thus meaningless. Furthermore, as the UDC is not the State, 880 F. Supp. at 243-44, the notion that UDC could plan State assistance is similarly unfounded.

(State Defs.' Reply Mem. at 22 n.7.)

Order of May 13, 1986 and has been implemented by the YBE since that date with funds provided by the City, and miscellaneous State and private foundation grants. The City with the support of the NAACP and the YBE sought an order requiring the State to provide financial support sufficient to enable EIP I to be implemented fully. On June 9, 1997, adopting a recommendation of some of the parties, this Court ordered its Monitor, Dr. Joseph M. Pastore, Jr. to "report and recommend to the Court what steps, if any, need be taken to implement fully EIP I including, but not limited to, the proportion of EIP I related costs which the State defendants should bear." Dr. Pastore's Advisory Opinion on the Matter of How the Financial Burden Should be Distributed to Implement the Court-Ordered Educational Improvement Plan is annexed hereto as Appendix I.

No party sought oral argument with respect to the Monitor's Advisory Opinion but all parties filed briefs on the issues addressed therein. The State's primary objection is that:

> because the evidence shows that, in part due to the generous funding voluntarily provided by the State, the provisions of EIP I have been fully implemented and the goals of that Order fully realized, the controlling decisions require that this Court relinquish jurisdiction over the Education remedy.

(State's Objections to Monitor's Advisory Op. of 8/14/87, at 1.)

The claim that EIP I's goals have been fully realized is based on an overly narrow view of that Order and factual misconceptions. While EIP I placed major emphasis on the assignment of students and school district reorganization, it was not limited to the physical placement of students but also addressed steps to achieve a unitary status for the YPS. Thus,

the 1993 Vestiges proceeding was not the first occasion on which the YBE and NAACP took the position that:

> the placement of majority and minority students and staff in the same school buildings in numbers proximate to their incidence in the general school population, so that schools are no longer racially identifiable, is but the first step to achieving a truly unitary school system. Such a unitary school system is in place only when students, regardless of race, have similar educational opportunities and experiences.

833 F. Supp. at 216.

EIP I adopted in 1986 § K included the following:

> Assurances. The Board shall establish a comprehensive staff development program which will be a component of its ongoing in-service program for teachers and administrators and will address areas such as racial attitudes, student discipline procedures, academic achievement and performance goals, teaching in a diverse racial/ethnic environment, and integration goals.

(Monitor's Proceedings YBE Ex. 1A.)[6]

In advancing its claim that this goal of EIP I was fulfilled, the State cites the fact that the YBE report for the year 1989-90 reported that "Implementation of the Educational Improvement Plan" was one of five major components of the district's staff development and in-service programs. (State's Objections at 5.)

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[6] All exhibits introduced at the Monitor's proceedings have been received in evidence before this Court. (See Trial Tr. at 27.)

But this contention ignores the overwhelming evidence that the district, because of lack of funding, does not have an adequate staff development program to deal with such matters as teacher's attitudes and expectations and other matters which are said to contribute significantly to lower achievement results of minority children.

The claim that EIP I's goals have already been fulfilled is rejected.

Another State objection is that EIP I has been funded entirely by the State. This issue raises the question fully addressed in the Monitor's Advisory Opinion, (App. A at 14-18), of the treatment to be accorded the State's allocation of $29.5 million for magnet program grants. Dr. Pastore concluded, based on the evidence presented before him, that the recent level of magnet program funding provided by the State serves in part as an equity adjustment and in part as a response to urgings by Yonkers representatives to support desegregation costs in Yonkers. (Id. at 18.) The State objects that this conclusion is based upon impermissible speculation as to legislative intent.

But the evidence before the Monitor, especially that of Claire Eatz, principal budget examiner of the New York State Division of Budget, cited by Dr. Pastore, fully supports his characterization of State magnet aid and the treatment accorded such aid in the formula which he recommends. The issue is not one of the subjective intent of the legislature but rather what the objective facts show to be the effect of the State funding, the method by which the amount of funding is determined, the lack of any assurance of continuity and of any specific relevant direction as to the application of such funding.

We have reviewed the other State objections and find them to be without merit.

We adopt and approve the Recommendations in the Advisory Opinion insofar as they apply to implementation of EIP I and proceed to a consideration of EIP II.

B. EIP II

The YBE has promulgated an Educational Improvement Plan, (EIP II Ex. 1A), adopted by the Board in September 1997. In its Foreword to the Plan, signed by the Superintendent of Schools Reginald Marra, and President of the Board of Trustees, Elaine Tsu, it is stated:

> EIP II represents the best thinking of hundreds of people in our educational community on the elimination of vestiges of segregation. The plan was developed by trustees, administrators, teachers, parents, students and community representatives. To develop this plan we have sought the advise of noted educators and have evaluated research from urban centers throughout this country.

(EIP II Ex. 1A at 1.) The Plan states that it has

> one major goal, which focuses on the equity of student outcomes. It is: To eliminate all vestiges of segregation in the Yonkers Public Schools (thereby eliminating gaps in achievement and other learning outcomes).

(Id.)[7]

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[7] A further description of EIP II is set forth in the Order which immediately follows this Opinion and sets forth in greater detail the steps to be taken in an effort to eradicate vestiges of segregation in the YPS.

EIP II identifies specific vestiges of segregation which have previously been cited and purports to address them directly as follows:

> The Vestiges
>
> In achieving the goal of eliminating vestiges of segregation, EIP II focuses on vestiges and the evidence of vestiges to propose specific remedy actions to remove the vestige.
>
> 1. Vestige: "Within many schools in Yonkers, there remains racial and ethnic segregation of students among various levels of courses, programs, classes and in-class grouping, which affects the quality and type of education provided to children of different racial and ethnic groups." ... "The implementation of EIP I has not addressed or alleviated many of the conditions of inequality that were fostered by the racially dual system of education in Yonkers, such as racially disparate attitudes and expectations of teachers and administrators; teaching methods that support effective instruction primarily for middle or upper middle class white students in homogeneous classrooms; curriculum that is neither multicultural nor aligned to the goals and objectives of the desegregating school system; and a lack of adequate services for students with limited English proficiency."
>
> Action Plan: The alignment of a curriculum, assessments and teaching methodology with State and National Standards, and access to those supports that will enable minority students to succeed in courses using high level curriculum.

Action Plan: Providing continuing professional development that will equip all teachers with the knowledge and skills needed to teach to an increasingly diverse student population with a variety of educational, language, social, and health needs. Developing appropriate time for staff development through summer seminars and classes on teaching and learning and those specific areas relevant to eliminating vestiges. Providing time and resources during the school year; for in-school staff development and development of a strong staff supervision and evaluation component to determine the effectiveness of staff development. Provide adequate and appropriate materials and equipment to each classroom.

2. Vestige: "The implementation of EIP I has not addressed or alleviated many of the conditions of inequality that were fostered by the racially dual system of education in Yonkers, such as pupil personnel services, that are particularly important to the effective education of minority children."

"The advent of desegregation has resulted in a greater need for the services of social workers and guidance counselors. Ironically despite this greater need, the ratio of such support staff to students has decreased. Where once there was a social worker assigned to each school building, this is no longer the case."

"The implementation of EIP I itself has given rise to a number of problems that must be addressed to ensure effective education in a desegregated setting, such as the increased difficulty of obtaining parental involvement in schools that, by

necessity, no longer serve populations drawn exclusively from surrounding, segregated neighborhoods."

Action Plan: The restructuring of schools to place greater focus on the needs of minority students through more individual attention to students, smaller class and school size, increased counseling and increased parent outreach to minority families.

3. Vestige: "Although EIP I has been successful to date in maintaining desegregated school enrollments, its ability to support continued voluntary desegregative movements of students within Yonkers and its ability to attract enough middle class and non minority students to provide for meaningful desegregation in the future will be seriously undermined unless the magnet school programs are fully implemented and the overall quality of education in the system is improved."

"Not only must teaching techniques and curriculum be reexamined and redesigned to meet these needs, but the physical condition of the YPS must be restored and enhanced if a desegregation program which relies primarily on voluntary selection of magnet schools is to retain its accomplishments to date and attain its ultimate goal of a truly unitary school system." (1993).

Action Plan: The court-ordered desegregation plan in Yonkers depends heavily on parental choice. Experience in communities throughout the United States demonstrates, however, that even where such programs work well, initially, follow-up, review, planning, adjustment and reinforcement

> are critical to achieving long-range success. EIP II includes such an effort. It is important that the district needs to further examine its magnet programs to determine those successful concepts or practices to be replicated and those to be eliminated or revised. The success of the Yonkers desegregation plan (EIP II) depends on parents' belief in the school system and its ability to educate their children to their highest level of achievement. As this is a school district of choice, parents must believe that this level of education can be achieved at each of the district's schools and that their choice is one of enhanced program, not attainment of basic skill. This will be in part accomplished through the above action plan and through the renovation and enhancement of the physical plant, but also through the evaluation of all of our programs and through ongoing two-way communication with our community.

(EIP II at 3-5.)

According to its proponents, the function of EIP II is to provide a framework for a standard based accountability for the YPS. Ramon C. Cortines, testifying for the YBE as an expert on standard based education and desegregation, stated that this technique was effectively utilized in three school districts which he had headed which were undergoing desegregation: Pasadena, San Diego and San Francisco. His testimony, together with that of Dr. Gladys Pack, chief coordinator for the YPS of EIP II, and the deposition testimony of Dr. Linda Darling-Hammond, supported the contention of the YBE that EIP II embodied the latest thinking and experience in informed educational circles of how to deal with vestiges of segregation in an urban school district.

All of the YBE's witnesses emphasized that EIP II was a broad framework which required additional planning on a school by school basis. Some of its provisions, such as development of a district wide core curriculum consistent with State and national achievement standards, will clearly require additional time and study. A school by school analysis of all aspects of EIP II will be required.

EIP II is the framework for an eight year program with the phasing in of individual schools over a five year period. The selection of which schools would be phased in and when this was to occur was in large part a function of physical conditions. EIP II calls for reduced class sizes and an increase in support staff (e.g., social workers, staff developers, etc.). Both of these programs entail space considerations. The Plan does state, however, that

> [d]uring the phase-in period all schools will align their staff development and student support activities with those of EIP II to the extent possible to allow for a more coordinated plan.

(Trial Ex. 1A at 20.)

Prior to submission to the Court, the Plan was widely disseminated in Yonkers and has been the subject of various community meetings. We are told the community response has been favorable.

Superintendent Marra testified that the next step following court approval would be a 12-14 week period of intensive planning so that the individual schools would have a program to

start implementing the plan in September 1998.[8] This planning would require the retaining of planning and engineering consultants and funds to pay teachers and administrators to come in on Saturdays and work after school. During this 12-14 week period, work would be done on curriculum and on recruitment. He estimated that it would cost $450,000 to start the planning for the eight schools to be phased in during the first year and that the current school budget does not contain funds available for that purpose. (Trial Tr. at 989-90.) This cost estimate was not challenged by the State.

The criticisms to EIP II expressed by the State's expert witnesses, Dr. Theresa Bucci and Jeanette Canady are principally directed to the fact that EIP II is lacking in needed detail or does not make sufficient use of helpful resource material made available by the State. Thus Dr. Bucci identified several factors which she believed were relevant to increasing student achievement.

a) Lack of ongoing daily assessment of individual students by their teachers.

b) Non-alignment of curriculum.

c) Not enough intensive exposure of bilingual students to English.

d) Development of strategies for taking tests, especially for the lower grades.

e) Dealing with student mobility.

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[8] The State's witness, Dr. Bucci, testified that several months were necessary to develop an effective individual school implementation budget. (Trial Tr. at 144-45.)

f) Need to measure attendance and enforce attendance requirements.

(Id. at 71.)

Dr. Bucci agreed that some of these causes of student underachievement exist in the Yonkers Public Schools and are not being adequately addressed. (Id. at 72.)

But in fact EIP II contemplates dealing with all of the causes of underachievement which Dr. Bucci cited. Smaller class sizes and staff training certainly address the need for greater teacher assessment of individual students. Adoption of a district wide core curriculum will help alleviate the adverse impact of student mobility within the district. Enhancement of training for Limited English Proficiency students and enhancement of support personnel to deal with absenteeism are also directly addressed in EIP II.

Other objections to EIP II have been, we believe, adequately addressed in what has gone before. It is not the case that the YPS now have available all that is required to implement needed programs to eradicate vestiges of segregation. Where special grants have been received from private foundations which have supported specific educational enhancements, like furnishing reading aides, the results achieved have been promising. The basic premises that all children can learn and that the critical factor in evaluating a school system is the achievement levels of its students, is recognized and would be operative pursuant to EIP II.

The State's claim that EIP II calls for the YBE to do things which it would be required to do absent a history of past segregation – e.g., meeting state wide testing levels or adoption of a curriculum – misses the point. Although, of course, the teaching enhancements envisioned by EIP II will benefit majority

as well as minority students, EIP II is directed specifically toward eradication of vestiges of segregation.

The Court finds that the EIP II plan proposed by the YBE provides the framework for an appropriate remedial plan tailored to the task of eliminating the vestiges of segregation in YPS to the extent practicable.

V. Implementation

The Planning Process - The Next Fourteen Weeks

There is a compelling need to undertake forthwith the further development of EIP II so that implementation of the remedial measures of that plan may begin in September 1998. Indeed, it would be tragic if another school year were to go by without significant additional measures being taken to address the vestiges of segregation found in the YPS. The cost of such planning estimated by Superintendent Marra to be $450,000 is relatively modest when compared to other costs of this litigation. In the Court's order, entered this day, we have directed the State to participate fully in this planning process and to defray its costs.

The State has continued to avoid any meaningful involvement in the efforts to eradicate vestiges[9] despite the general "hands

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[9] Superintendent of Schools, Reginald Marra, testified as follows:

Q. You're familiar with the vestiges decision that the court issued in 1993. Is that correct?
A. That's correct.
Q. Has anyone from the State Education Department ever contacted you or the schools about that decision?
A. No.
Q. To what extent has anyone in the State Education Department ever undertaken to evaluate the conditions in the

on" approach of the State Education Department with respect to other matters concerning education. In essence the State has adhered to the abstention policy fully detailed in the findings of fact set forth in our 1995 opinion (880 F. Supp. at 218-224). The State advances a number of reasons for this posture: the matter is in litigation; the YBE's settlement offer is unreasonable; vestiges do not exist; the State has no liability and adequately discharges its overall obligations by the funding grants to Yonkers, especially its magnet school grants. Thus the State has confined its role to that of an aggressive litigant, seeking to avail itself of all opportunities for delay and resisting all exhortations that, in the discharge of its obligation to the children, it take a more active and positive role.

In light of the determinations made by the Court of Appeals with respect to the liability of the State and the findings of this Court herein, it would be appropriate for the State, without prejudice to whatever rights for appellate review which it may seek to preserve, to cooperate fully with the YBE and Superintendent Marra in moving EIP II forward. Educators rather than litigators should dominate the planning process.

Having said all this, however, we recognize that the State may refuse to participate either intellectually or fiscally in this next stage of implementing EIP II. However, even if this Court's orders vis-a-vis the State are stayed by an appellate court, the planning process should go forward. As the Court stated in its Opinion of July 10, 1992 and repeated in its vestiges Opinion:

Yonkers Public Schools to see whether they're consistent or inconsistent with the statements in that decision?
A. Not that I am aware of.

(Trial Tr. at 972-73.)

> we put all parties on notice that if vestiges of segregation are found to exist and to be inadequately addressed, the Court will consider what action is appropriate and will not be limited to the relief sought by the YBE and NAACP against the State.

833 F. Supp.at 217.

In the event that State funding for the $450,000 planning process is not forthcoming (e.g., by virtue of an appellate court stay), such funds are to be furnished by the City of Yonkers which is of course clearly liable by virtue of prior court decisions.[10] The planning should be based on the assumption that the State will ultimately contribute to the costs of EIP II along the general lines set forth in Dr. Pastore's Advisory Opinion and in amounts to be determined pursuant to the provisions of the accompanying Order. Payment by the City of the entire cost of this planning process would be without prejudice to the City's right to seek refund of some or all of such funds from the State fund when whatever obstacle to State participation has been removed.

The paramount concern should be to expedite as fully and expeditiously as possible the eradication of all vestiges of segregation remaining in the YPS.

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[10] During the 1993 vestiges hearing the City took the position that the YBE and NAACP had not proven the existence of vestiges which the City was due to remediate under applicable federal law and presently asserts that it has not waived this position. (Def. City of Yonkers' Post-Hr'g Mem. at 3.) We reject the concept that vestiges require eradication if State funds are available for this purpose but may be tolerated if State funds are not forthcoming.

The Court has entered an Order which follows this Opinion.

Dated: New York, New York
October 8, 1997

s/ Leonard B. Sand
U.S.D.J.

September 23, 1996
Opinion of the Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1450, 1451—August Term, 1995

(Argued: April 11, 1996

Decided: September 23, 1996)

Docket Nos. 95-6182, 95-6206

UNITED STATES OF AMERICA,

Plaintiff,

YONKERS BRANCH - NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, ET AL.,

Plaintiffs-Appellants,

— v.—

CITY OF YONKERS; YONKERS COMMUNITY DEVELOPMENT AGENCY; and U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, Samuel Pierce, Secretary,

Defendants,

YONKERS BOARD OF EDUCATION,

Defendant-Appellant,

THE STATE OF NEW YORK; GEORGE E. PATAKI, as Governor of the State of New York; BOARD OF REGENTS OF THE STATE OF NEW YORK; MARTIN C. BARELL; R. CARLOS CARBALLADA; ADELAIDE L. SANFORD; WILLARD A. GENRICH; EMLYN I. GRIFFITH; JORGE L. BATTISTA; LORA BRADLEY CHODOS; LOUISE P. MATTEONI; EDWARD MEYER; FLOYD S. LINTON; SALVADORE SCLAFINI; MIMI LEVIN LIEBER; SHIRLEY C. BROWN; NORMA GLUCK; THOMAS FREY; JAMES MCCABE, SR., in their official capacities as members of the State Board of Regents; DEPARTMENT OF EDUCATION OF THE STATE OF NEW YORK; THOMAS SOBOL, as Commissioner of Education of the State of New York; URBAN DEVELOPMENT CORPORATION OF THE STATE OF NEW YORK; VINCENT TESE, as Director of the Urban Development Corporation,

Defendants-Appellees.

Before:

KEARSE and ALTIMARI, *Circuit Judges*,
and MORAN, *District Judge**.

Appeal from a judgment of the United States District Court for the Southern District of New York, Leonard B. Sand, *Judge*, dismissing complaint against State defendants and Urban Development Corporation for actions and omissions contributing to unlawful housing and

* Honorable James B. Moran, of the United States District Court for the Northern District of Illinois, sitting by designation.

school segregation in the City of Yonkers. *See* 880 F. Supp. 212 (1995); 888 F. Supp. 591 (1995). Held: State may not permissibly engage in deliberate conduct or deliberate omissions that have the foreseeable effect of perpetuating known segregation, where its acts or omissions are undertaken in response to and in accordance with the segregative wishes of others that were known to be racially motivated.

Vacated and remanded for further proceedings.

MICHAEL H. SUSSMAN, Goshen, New York, *for Plaintiffs-Appellants.*

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KEARSE, *Circuit Judge*:

Plaintiffs-appellants National Association for the Advancement of Colored People, *et al.* ("NAACP"), and defendant Yonkers Board of Education ("Board of Education" or "Board"), a cross-claimant (collectively "plaintiffs"), appeal from a judgment of the United States District Court for the Southern District of New York, Leonard B. Sand, *Judge*, dismissing their complaint under 42 U.S.C. § 1983, Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.* ("Title VI"), and the Equal Educational Opportunities Act of 1974, 20 U.S.C. § 1701 *et seq.* ("EEOA"), against defendants The State of New York ("New York State") and various of its officials and agencies, including the Governor and the New York Board of Regents (collectively the "State"), and the New York State Urban Development Corporation and its director (collectively "UDC"). Plaintiffs contended that the housing and school segregation previously found to exist in the City of Yonkers ("Yonkers" or the "City") in violation of the Constitution and federal statutory law, *see* 624 F. Supp. 1276 (S.D.N.Y. 1985), *aff'd*, 837 F.2d 1181 (2d Cir. 1987), *cert. denied*, 486 U.S. 1055 (1988), was contributed to by the State and UDC and that those defendants should assist in remedying the vestiges of that segregation. The district court, although finding that the State and UDC had failed to take effective action despite the fact that they knew or should have known of the *de jure* segregation in Yonkers, concluded principally that plaintiffs' complaint must be dismissed on the grounds that their claims were foreclosed by this Court's decision in *Arthur v. Nyquist*, 573 F.2d 134 (2d Cir.), *cert. denied*, 439 U.S. 860 (1978), and that the claims against UDC were barred by the statute of limitations. On this appeal,

plaintiffs challenge the court's legal conclusions. For the reasons that follow, we conclude that plaintiffs' claims are not foreclosed by *Arthur v. Nyquist*, and we accordingly vacate the judgment and remand for further proceedings.

I. BACKGROUND

The early history of this litigation and the events leading to it have been explored extensively in prior published opinions of this Court and the district court. The action, charging housing and school segregation in violation of the Equal Protection Clause and various federal civil rights statutes, was commenced by the United States in 1980, was joined by NAACP, and was pursued as a class action against the City, the Board, and the Yonkers Community Development Agency. After a lengthy trial, the district court found those defendants liable for intentional discrimination in housing and education, *see* 624 F. Supp. 1276 (1985) ("*Yonkers I*"), fashioned remedial orders, *see* 635 F. Supp. 1538 and 1577 (1986) ("*Yonkers II*"), and entered judgment accordingly. This Court affirmed the judgment of the district court in all respects. *See* 837 F.2d 1181 (1987) ("*Yonkers III*"), *cert. denied*, 486 U.S. 1055 (1988). Familiarity with those opinions is assumed.

At the time of those decisions, the State and UDC were not parties to the action.

A. *The Addition of the State and UDC as Defendants*

In 1987, NAACP moved to add the State and UDC as parties defendant. The Board, which the district court found had by then, "[a]s a result of [the Board's] good faith and zealous implementation" of the district court's

1986 remedial order, "achieved desegregation of enrollments among the schools," 833 F. Supp. 214, 216 (1993) ("*Yonkers IV*") (internal quotation marks omitted), sought leave to file a cross-claim against the State and UDC. NAACP and the Board alleged that while the Board's implementation of the court's remedial order had had an immediate inter-school desegregative effect, it would not be effective either (a) to eliminate, to the extent practicable, inequalities in the educational program, intra-school segregation, and other vestiges of the prior unlawful segregation in Yonkers, or (b) to maintain desegregation. Plaintiffs contended that the State and UDC had known of the *de jure* segregation in Yonkers; had nonetheless, in response to pressures they knew to be race-related, failed to take effective action to eliminate that segregation and had contributed to it; and should be compelled to assist in eliminating the vestiges of that segregation. After holding the motions in abeyance pending plaintiffs' attempts to obtain the State's consensual assistance, the district court in 1989 granted the motion to add the State and UDC as defendants.

After several unsuccessful attempts by the State and UDC, both in the district court and on appeal, to have the case against them dismissed summarily, the district court held trials on the questions of (a) whether unaddressed vestiges of unlawful segregation continued to exist in the Yonkers schools, and (b) if so, whether and to what extent the State and UDC were liable. In its vestiges decision, rendered after a three-week trial in 1993, the court defined "vestige of segregation" as "a policy or practice which is traceable to the prior *de jure* system of segregation and which continues to have discriminatory effects," *Yonkers IV*, 833 F. Supp. at 218-19, and found

that vestiges of segregation remained in the Yonkers schools, noting, *inter alia*, "that although minority students in Yonkers attend school in the same buildings as majority students, they are undergoing different educational experiences," *id.* at 225. The court found that compliance with the existing remedial orders would be inadequate to eliminate the vestiges of segregation.

The vestiges decision was not embodied in a final judgment and the State's immediate appeal seeking review of that decision was dismissed. The merits of the vestiges decision are not before us on this appeal.

In 1994, the court held a six-week trial on whether or not the State and UDC should be held liable for Yonkers's unlawful school segregation and its vestiges. Plaintiffs contended, *inter alia*, that those defendants were liable because (1) State education officials knew that *de jure* segregation existed and was increasing in Yonkers schools but took no steps to prevent or remedy that segregation; (2) State education officials failed to implement established New York State policy which required eradication of even *de facto* segregation, and their conduct was motivated by racially-based community and political opposition to that policy; and (3) UDC, though initially proposing scattered-site family-housing construction that would have lessened housing segregation in Yonkers, capitulated to what it knew to be race-based community and City pressure and participated in placing all of its subsidized family-housing projects in the already predominantly minority southwest section of the City, *see, e.g.*, *Yonkers III*, 837 F.2d at 1240-41 (Appendices A and B), thereby exacerbating school segregation. In support of their contentions, plaintiffs presented evidence of, *inter alia*, the knowledge of the State and UDC of segregation and related

inequalities in Yonkers; defendants' knowledge of the motivations of local officials and their constituents in opposing desegregation; and the power of the State to take steps to achieve desegregation, including the authority conferred on its Commissioner of Education ("Commissioner") by N.Y. Educ. Law § 310 (McKinney 1995) to initiate quasi-judicial proceedings *sua sponte* to enforce New York's education policies.

The court received thousands of exhibits and received testimony from more than 30 witnesses, including members and former members of the New York Board of Regents, a former Commissioner, a former Deputy Commissioner, key officials from the State Education Department ("SED"), the former head of UDC, and UDC officials who were responsible for the agency's housing activities in Yonkers. The court also heard testimony from City officials and community leaders who had interacted with the State and UDC on school and housing matters.

Following that trial, the court handed down the two liability opinions at issue on this appeal. In the first, 880 F. Supp. 212 (1995) ("*Yonkers V*"), the court made factual findings that were largely favorable to plaintiffs; but it concluded that the § 1983 claims against the State officials were precluded by *Arthur v. Nyquist*, 573 F.2d 134, and that those against UDC were time-barred. In the second opinion, 888 F. Supp. 591 (1995) ("*Yonkers VI*"), the court concluded that the facts established were insufficient to make the State liable under Title VI or the EEOA.

B. Yonkers V: *Dismissal of the § 1983 Claims*

1. *The District Court's Findings With Regard to Schools*

In *Yonkers V*, the district court considered plaintiffs' claims under § 1983 and made factual findings with regard to the State's knowledge, its power, its conduct, and its motivation.

With respect to knowledge, the court found that there could be no doubt whatever that the State was aware early of the existence of segregation in the Yonkers public schools, and it found that the State knew or reasonably should have known that the segregation was *de jure*. It found that "the State defendants were aware of circumstances that should have alerted them to the likelihood that Yonkers had a substantial problem of unlawful segregation in its schools" and that "if in fact the State defendants were not so alerted, it was because they themselves chose to remain ignorant" "in the face of actual conflicting evidence," *Yonkers V*, 880 F. Supp. at 219, 220; that the State thus had "actual or constructive[ ] knowledge of illegal racial segregation in the Yonkers public schools," *id.* at 220; that the State indeed had "full knowledge of the nature, cause and extent of the segregation in the Yonkers public schools," *id.* at 245; and that "SED can fairly be charged with knowing that Yonkers, if left to its own devices, was not going to remedy the segregation voluntarily," *id.* at 219.

> In sum, . . . the State knew about the segregation that existed in the Yonkers Public Schools, knew that Yonkers would not on its own take the steps necessary to end the segregation, and either knew or

> reasonably should have known that the segregation was *de jure* rather than *de facto*.

Id. at 220.

The court found that the State defendants had the authority to take steps to eliminate the segregation, whether *de jure* or *de facto*, in the Yonkers schools. The court found, *inter alia*, that "New York law has prohibited *de jure* segregation since 1900"; that "[a]s early as 1960, the New York State Board of Regents issued a policy statement urging school districts to take the steps necessary to end *de facto* desegregation in New York's public schools"; that "the Regents reaffirmed that position in a series of subsequent racial integration policy statements"; and that there were numerous statutorily authorized options by which the anti-segregation statute, *see* N.Y. Educ. Law § 3201(1) (McKinney 1995), and the policy statements "could have been enforced by the Commissioner." *Yonkers V*, 880 F. Supp. at 220. The cited options included withholding state financial aid from Yonkers, removing school officials, initiating a proceeding designed to investigate and remedy the segregative conditions, promulgating regulations, and withholding approval of the purchase or building of new school facilities. *See id.* at 220-22. The court concluded that the State "possessed the full means and authority needed to deal with Yonkers school segregation, had it been inclined to do so." *Id.* at 245.

The district court further found that normally "SED is one of the most activist state educational bodies in the country, ... vigorously monitor[ing] and regulat[ing] many different aspects of education, including special education, bilingual education, vocational training, achievement scores, dropout prevention, . . . school

building construction," and school sports safety. *Id.* at 223. Indeed, in other New York communities during the 1960s and early 1970s, State education officials actively attempted to bring an end to the racial imbalance that existed in public schools in those communities. "The SED, under Commissioner Nyquist, did not hesitate to enforce the racial integration policy in connection with § 310 appeals from private citizens," *id.* at 225; and SED sometimes recommended action to correct racial imbalance in schools with respect to which no citizen had ever appealed, *see id.* The court thus found the State's arguments that SED lacked the power to intervene in Yonkers "singularly unpersuasive." *Id.* at 223. It concluded:

> The Court finds that the State had several effective means for compelling local compliance with its racial integration policy during the years at issue in this litigation. If the State did not in fact force compliance, it certainly was not because it lacked the authority or practical power to do so.

Id.

Instead, the State defendants did nothing to remedy school segregation in Yonkers, using none of their powers or authority toward that end. "From the moment in the late 1960's that the State became aware that conditions of racial imbalance were developing in the Yonkers schools, it was in a position to require Yonkers to undertake remedial measures," but "[i]t never took advantage of that position." *Id.*

> Rather than act, the State waited. It waited for private citizens in Yonkers to invoke the State's help by filing § 310 petitions, . . . but no petition was ever filed. It waited for Yonkers to make voluntary efforts to desegregate its schools, and asserts

> that it stood ready with offers of money and technical assistance to aid such efforts. . . . But it never forced the issue. When, for example, the Yonkers education community appeared ready in 1970-71 to take steps to end the segregation in the schools, . . . the SED dispatched staff member Morton Sobel to talk to the local PTA groups. Sobel's message was relatively soft: Yonkers is a segregated district; segregation is not good for children; it is up to you to do something about the condition in your schools. . . . When Yonkers did nothing about the condition in its schools, the State dropped the issue.

Yonkers V, 880 F. Supp. at 223-24. "The State did not, in short, require anything of Yonkers in the area of school desegregation." *Id.* at 223. While proclaiming a willingness to help Yonkers if Yonkers were to choose to desegregate voluntarily, the State decided that "it would not force Yonkers to change." *Id.* at 224.

In addition to refusing to act to end segregation in Yonkers, the State took certain actions that had the effect of encouraging that segregation. While noting that there was no evidence that SED officials affirmatively took steps intending to preserve Yonkers school segregation or to impede Yonkers itself from eliminating it, or that they indicated to anyone in Yonkers that they approved of that segregation or would "look the other way" should Yonkers decide to continue that segregation, and noting that there was no evidence that if a Yonkers citizen had filed a desegregation § 310 petition the Commissioner would not have responded to that petition promptly and fairly, the court found, *inter alia*, that the Board of Regents itself took actions that were, and were recognized to be, designed to cut back on school desegrega-

tion. For example, in two § 310 proceedings brought by SED Commissioner Nyquist, individual Regents interceded, urging that the Commissioner not enter drastic desegregation orders. Moreover, as a body, the Regents sought to "rein in Nyquist's desegregation efforts, . . . [by] lobb[ying] for legislation providing for stricter judicial review of the Commissioner's § 310 orders." *Yonkers V*, 880 F. Supp. at 226. Further, in 1974, the Regents revised their policy statement on segregation so as to "dilute[ ] [its] pro-desegregation force." *Id.* at 225. Finally, in November 1976, the Regents fired Nyquist.

The reasons for the State defendants' actions and inactions, the district court found, were that those defendants were responding to pressures by New York State officials and constituents who opposed desegregation on grounds that were known to be race-based.

> By 1969, . . . opposition to non-voluntary means to achieve racial integration in the schools—and to racial integration itself—had swelled to the point where *the New York State Legislature enacted* Chapter 342, *a law that prohibited State education officials, as well as local school districts with appointed school boards, from assigning students for the purpose of achieving racial balance or of taking other desegregative actions*. Although the statute was ultimately declared unconstitutional, as violative of the Equal Protection Clause, . . . *the attitude of the State Legislature was clear*. Indeed, even after Chapter 342 was struck down, the Legislature continued to debate and pass bills and resolutions that were similar to Chapter 342 in their purpose and intended effect. . . .

> *Following the invalidation of Chapter 342, the State took measures that had the cumulative effect of undermining efforts to reduce school segregation.* In 1971, the Legislature eliminated the Racial Balance Fund, which was the source of funding to assist communities in undertaking the expensive task of desegregating their schools, and refused each year thereafter to reinstate the Fund despite annual requests to do so from State education officials. The elimination of the Fund deprived State officials of one of the few positive inducements they had to encourage local acts of desegregation, and thereby weakened their efforts to implement the Regents' racial integration policy. . . .
>
> Changes were also taking place in the composition of the Board of Regents due to the accession to the Board of new Regents, interviewed prior to appointment by legislators (a new practice), who were known to be hostile to vigorous desegregation efforts.

Yonkers V, 880 F. Supp. at 225 (emphases added). In 1974, the State legislature passed a law shortening the Regents' terms of office "in order to make them more 'accountable' to elected officials and their constituents." *Id.* Further, the court found that the Regents, in revising their policy statement on segregation in a way that "diluted [its] pro-desegregation force," were "prodded by criticism of Commissioner Nyquist's vigorous desegregation efforts." *Id.* As for their firing of Nyquist, "[h]is views on [integration] were a substantial factor leading to his discharge." *Id.* at 226.

The district court found that the "determined reluctance" on the part of the State "to enforce its own deseg-

regation policy in Yonkers," *id.* at 224, resulted chiefly from that fact that "race-based political opposition to integration throughout New York State eventually exerted enough pressure on the Regents and on SED officials as to cause them to become cautious and reactive on the issue of desegregation." *Id.* at 224-25. "These pressures can only be explained in racial terms." *Id.* at 245. In summary, the district court found that

> the State had the power to act in support of school desegregation in Yonkers, but it lost the will to act. And it lost the will to act for the simple reason that its once touted principles of racial equality in the schools had become politically untenable.

Id. at 227. The court found "that the State's gradual retrenchment from its once strong school desegregation policy, as just outlined, was motivated by a growing antipathy to desegregation on the part of the New York State Legislature." *Id.* at 226.

The district court found that the State's acts and omissions "impacted the City in several ways." *Id.* at 227. The most obvious way was that "Yonkers was not forced to desegregate its schools. There is every reason to believe that had the State brought its coercive powers to bear in Yonkers, Yonkers would have complied with its directions." *Id.* In addition, the State's stance "altered the balance of power between the forces in Yonkers favoring reform and the forces in Yonkers opposing reform." *Id.* For example, when SED staff member Morton Sobel visited Yonkers in the early 1970s, bringing PTA groups merely the "tepid" message that segregation is not good for children and that something should be done about it, opponents of desegregation " 'were delighted that they didn't have to deal with the issue [of

desegregation], that it seemed as though it wasn't imperative.' " *Id.* (quoting testimony of Yonkers PTA member (modification in *Yonkers V*)). As another example, in 1975, SED promised $80,000 in funding to a task force authorized by the Board to develop a plan for desegregating the Yonkers schools; but SED proceeded to delay in providing any funding and then ultimately provided only $13,000. SED's conduct hindered the task force's efforts and "enabled opposition to the reform efforts to coalesce to the point where the [Board itself] became hostile to the very desegregation initiative it had originally commissioned." *Id.*

Further, "there was a public perception in Yonkers that Commissioner Nyquist's termination came as a result of his pro-integration stance. This perception added to the widespread belief that the State would not aggressively address the problems in the Yonkers schools or elsewhere in New York. And, whether accurate or not, this belief bolstered those in Yonkers who hoped that the State would in fact leave Yonkers alone." *Id.* at 228. Thus, one group, opposing a 1978 desegregation proposal by the then-superintendent of Yonkers schools, urged rejection of that proposal " 'without being intimidate[d] by fear of federal or state agency sanctions' " because

> "[t]he State Department of Education . . . . after going through a period marked by particularly zealous integration directives, is modifying its approach. Last spring, the former commissioner of education Ewald Nyquist, was dismissed because of his single[-]minded pursuit of desegregation throughout the state by busing and other means whether or not warranted. It is now obvious that the

> Board of Regents is taking a more cautions view of integration cases and directives."

Id. at 227-28 (quoting Report of Taxpayers Organization of Northeast Yonkers, dated March 5, 1978, at 4). The State officials and the Board of Regents made "no serious effort" to dispel the public perception, of which they were aware, that the State would not force Yonkers to desegregate, *Yonkers V*, 880 F. Supp. at 228 n.16.

"Thus it occurred that in Yonkers, where local support for desegregation was minimal and no citizen-initiated . . . proceeding was ever commenced, desegregation simply did not take place until it was compelled by order of the federal court." *Id.* at 224.

2. *The District Court's Findings With Regard to Housing*

The district court found that the State also had knowledge that site selection for new subsidized family housing in Yonkers exacerbated segregative conditions both in housing and in the schools. The court found that, like the State, though UDC had the power to take steps to alleviate the housing segregation, UDC failed to do so, and instead worsened segregation by knowingly bowing to political pressure that it knew was race-based.

UDC, "[c]ombining functions, such as housing finance and project development, that were formerly performed by separate entities," "was perhaps the most powerful state housing and development agency ever created." *Yonkers V*, 880 F. Supp. at 228. It had "the unprecedented authority to override local building and land use controls and to exercise powers of eminent domain." *Id.* Nonetheless, though it had these powers and was staffed with "enthusiastic and idealistic persons," who were,

"initially," "dedicated to the creation of fair housing" at sites scattered throughout Yonkers, *id.*, "UDC was soon made aware of strong local opposition to the building of subsidized housing in the predominantly white areas outside of Southwest Yonkers," *id.*, and it capitulated to that opposition while "clearly ha[ving] at least some knowledge that this opposition was race-based," *id.* "[C]onfronted with this race-based community opposition and concerned about the political feasibility of scattered-site housing, [UDC] made a determination not to exercise its statutory override powers, which would have enabled it to proceed without local approval." *Id.* Thus, "between 1969 and 1975 the UDC, regardless of its long-term plans or good intentions, knowingly acquiesced and indeed participated in the segregative site selections." *Id.* at 229. UDC consequently "worsened the already segregated state of housing and schools in the City." *Id.* "[A]t least some SED staff knew during the mid-to-late 1970's that Yonkers was planning to build subsidized housing in a way that would enhance segregation." *Id.* at 244 n.37.

3. ***The District Court's Conclusions of Law***

Notwithstanding the above findings, the district court, "with reluctance," *Yonkers V*, 880 F. Supp. at 245, concluded that plaintiffs' claims against the State officials under § 1983 must be dismissed on the basis of this Court's opinion in *Arthur v. Nyquist*, 573 F.2d 134 ("*Arthur*"). The district court construed *Arthur* to mean that "a state's knowing failure to meet its obligation to eradicate segregation is insufficient to impose liability on the state," *Yonkers V*, 880 F. Supp. at 234; that "more than knowledge of wrongdoing and the power to end it is required before § 1983 liability can be imposed on a state," *id.* at 236; that "state officials cannot be held

liable for their mere inaction or failure to combat the segregative acts of local officials," *id.* at 244; and that, "abdication by the state in discharge of its duty to cause local districts to desegregate does not afford a basis for liability," *id.* at 245. Under this interpretation, the district court ruled that a finding of State liability was foreclosed by *Arthur*:

> [I]t is a close and difficult question whether the issues before this Court are qualitatively different from those dealt with by the Court of Appeals in *Arthur v. Nyquist*. The *Arthur* Court acknowledged the power that resided in the state educational authorities to deal with segregation in Buffalo and accepted the proposition that, "given the chosen policies of the state appellants, it was [not] unforeseeable that the Buffalo schools might remain segregated for an extended period of time." 573 F.2d at 146. But, the *Arthur* Court tells us, more than knowledge of wrongdoing and the power to end it is required before § 1983 liability can be imposed on a state. What else is required? If it can be shown that state and local authorities conspired to thwart state desegregation policies, the result would be different. If it can be shown that state officials gave local authorities *specific* approval, and thereby support, of their unlawful conduct, the result would be different. But the *Arthur* Court searched the record in vain for evidence of such complicity and approval, and we have engaged in a like inquiry, with like results. . . . The closest one approaches to approval is, in our opinion, the determination by the Commissioner and his staff not to recommend to the Legislature that funding proposals for the benefit of local school communities be made contingent

on adoption of desegregation programs. But the reason advanced was a concern that the legislation would fail in its entirety, not a desire to perpetuate segregation.

Indeed, there is no evidence of any affirmative pro-segregative action on the part of the State. The reining in of Commissioner Nyquist and the adoption of less aggressive integration statements over the course of the 1970's are compelling evidence that the State's policy with respect to local segregation grew increasingly passive and reactive, but the policy cannot fairly be categorized as being affirmatively in favor of segregation. State permissiveness and, in truth, state hypocrisy in the face of local segregation are not automatically tantamount to state encouragement and/or authorization of segregation. *See Arthur*, 573 F.2d at 146. That anti-desegregation groups in Yonkers tried to find in the State's permissiveness signs of actual, positive support for their position says something about the political forces at work in Yonkers; but it does not without more transform the State's failure to intervene in Yonkers into affirmative support of school segregation in Yonkers, from a legal standpoint. . . .

Since we are unable to find, after an exhaustive inquiry, conduct on the part of the State which would satisfactorily distinguish this case from *Arthur v. Nyquist*, and since th[at] case . . . is controlling on this Court, we answer in the negative the question of whether the State may be held liable for knowingly tolerating, *i.e.*, for not proceeding aggressively against, the *de jure* segregation that existed in the Yonkers schools.

Yonkers V, 880 F. Supp. at 236 (emphasis and modification in original).

Thus, although having found (a) that the State had the power to take action against school segregation in Yonkers that it knew or should have known was *de jure*, (b) that that school segregation was perpetuated by the conduct of the State that encouraged the opponents of desegretation, and (c) that the State conducted itself as it did because of pressures it knew to be racially motivated, the court nonetheless concluded that plaintiffs' § 1983 claims must be dismissed because the court believed itself "constrained by the decisional rule set forth in *Arthur*," *Yonkers V*, 880 F. Supp. at 245:

> We reach this conclusion with reluctance for several reasons.
>
> First, we find entirely unpersuasive the argument of the State that it lacked full knowledge of the nature, cause and extent of the segregation in the Yonkers public schools. . . .
>
> We find similarly unpersuasive the State's contention that it lacked the power to address adequately the problem of school segregation. There is no doubt in our mind that the State possessed the full means and authority needed to deal with Yonkers school segregation, had it been inclined to do so. We conclude that the State determined not to take any affirmative action to deal with Yonkers school segregation because of political and other pressures, from within the Board of Regents and from without, which opposed vigorous desegregation efforts. These pressures can only be explained in racial terms.

> However, we find no basis for imposing liability on the State because we find ourselves constrained by the decisional rule set forth in *Arthur v. Nyquist*. As have we, the court in *Arthur* found that the state had the power and duty to address segregation (there, in Buffalo), but nevertheless held that the absence of affirmative participation by the state in local pro-segregative conduct compelled a finding of no-liability. The teaching of *Arthur* is that abdication by the state in discharge of its duty to cause local districts to desegregate does not afford a basis for liability. . . .
>
> In the end, we conclude that the differences between this case and *Arthur* are quantitative, not qualitative. The extent of the State's determination *not* to act vis-a-vis school desegregation in Yonkers and the consequences of that inaction have been fully documented; but no more has been shown.

Yonkers V, 880 F. Supp. at 245 (emphasis in original).

The court reached the same conclusion with respect to the § 1983 claims against the State officials for housing segregation. It concluded that, notwithstanding the fact that the State education officials knew that the City's housing practices were segregative, knew of UDC's participation in the segregative housing site selections, and knew that those site selections exacerbated segregation in the schools, the State's conduct was not actionable under the court's interpretation of *Arthur*. *See Yonkers V*, 880 F. Supp. at 244-45.

As to the claims against UDC, the court found them time-barred. The court found that plaintiffs, who did not seek to make UDC a defendant until 1987, knew or should have known of UDC's role no later than 1975,

and that these claims were therefore barred by the three-year statute of limitations. The court rejected plaintiffs' contention that UDC's failure to remedy the vestiges of unlawful segregation should be viewed as a "continuing wrong," *id.* at 242, reasoning that UDC, whose participation in any housing program in Yonkers ended in 1975, *see id.* at 229, had no "ongoing, pervasive role in matters directly affecting school attendance zoning," *id.* at 243:

> [T]here is no authority for applying a "continuing wrong" theory to the housing defendants here. Although the courts have held some governmental entities to have an affirmative duty to take steps to eliminate the effects of past school segregation and have found a failure to take these steps to be a continuing violation of the affirmative duty, . . . this doctrine seems to have been limited only to defendants with an ongoing, pervasive role in matters directly affecting school attendance zoning. . . . The rationale for finding a continuing wrong by school authorities in these cases is that every assignment by school authorities of a minority student to a minority school is a new discriminatory act. . . . As defendants point out, "[t]here is no evidence, however, that UDC had such power over schools, students, or attendance lines, or assisted the Board in its exercise of such powers.". . . . Therefore, since the UDC's activities in Yonkers took place within a finite time interval and ceased entirely in 1975, this suit, commenced in 1987, cannot be maintained. We accordingly dismiss the claims against the UDC and its present director.

Id. at 242-43.

The district court also ruled that the actions of UDC could not be imputed to the State. It found that UDC, "an entity distinct and separate from the State" with "substantial operational autonomy," is not "an arm or an instrumentality of the State," *id.* at 243; and it stated that there was no evidence that State officials and UDC had worked together in a concerted manner in pursuit of a common segregative goal.

C. Yonkers VI: *Dismissal of the Title VI and EEOA Claims*

In a subsequent opinion, *Yonkers VI*, the district court ruled that the State defendants also were not liable under Title VI or the EEOA.

Influenced by its reading of *Arthur*, the court rejected plaintiffs' claims under Title VI on the ground that the court had not found that the State defendants themselves had engaged in purposeful discrimination. "In this case, acts of intentional racial discrimination have undoubtedly been found, but they have been found only on the part of local Yonkers officials, not on the part of the State defendants." *Yonkers VI*, 888 F. Supp. at 597. Stating that "a state no more 'intentionally' fosters racial segregation by failing to prevent local acts of intentional segregation than it 'intentionally' fosters racial segregation by failing to alter adventitious housing patterns—in other words, it does not unconstitutionally discriminate in either instance," the court concluded that the State's "failure to prevent local acts of segregation, without more," did not violate Title VI. *Yonkers VI*, 888 F. Supp. at 597.

The district court ruled that the application of the EEOA to the State would be inappropriate because the

decade-old court-ordered remedial plan had been entered without findings mandated by that statute. Stating that Congress's intent in enacting the EEOA was to "ensure that courts impose certain vigorous remedies (such as the compulsory transportation of students) only as a last resort, after due and explicit consideration of more moderate alternatives," the court noted that its remedial plan included, "albeit to a minimal degree," mandatory busing which then-parties had assumed was necessary, and that the court had not "made (nor [been] requested to make) specific findings regarding the efficacy of remedies other than busing." *Yonkers VI*, 888 F. Supp. at 595. The court concluded that holding the State liable under the EEOA would make the State a party to a busing order, that that result was inappropriate without the findings required by the EEOA, and that it was too late to reopen proceedings for the consideration of alternative remedial plans:

> We do not think it would be consistent with Congress' intent in adopting the EEOA to require the State to participate in a remedial plan that does not comport with the requirements of a statute applied retroactively to it. Nor do we think it would be sound, from any perspective, to reopen at this late stage in these proceedings questions relating to the proper scope of a remedial plan adopted and implemented a decade ago. Regardless of whether the State can be held vicariously liable as a matter of law under section 204 of the EEOA, we conclude that it cannot lawfully be made to participate in the remedial plan now in place in Yonkers. The State therefore cannot be held accountable under the EEOA in this case.

Yonkers VI, 888 F. Supp. at 595.

The court ordered the entry of a final judgment pursuant to Fed. R. Civ. P. 54(b) reflecting the *Yonkers V* and *Yonkers VI* dismissals of plaintiffs' claims against the State defendants and UDC, and this appeal followed.

II. DISCUSSION

On appeal, plaintiffs contend that they are entitled to a ruling that the State and UDC are liable for the vestiges of school segregation, given the district court's findings of fact. They contend that those findings distinguish the present case from *Arthur v. Nyquist*. The State and UDC contend principally that the district court correctly concluded that plaintiffs' claims against them are precluded by *Arthur*; they make few challenges to the court's factual findings. We have considered all of appellees' arguments on this appeal and conclude that the judgment of the district court cannot stand. For the reasons that follow, we conclude that the district court's findings of fact are supported by the evidence, and that those findings distinguish this case from *Arthur* and warrant the imposition of liability.

A. *The Equal Protection Claims and* Arthur

The fundamental principles governing equal protection claims are well established. They were thoroughly discussed in *Yonkers III*, 837 F.2d at 1216-18, 1221-27, and do not require extended discussion here. A plaintiff is required to show not only that the state action complained of had a disproportionate or discriminatory impact but also that the action was taken with intent to discriminate. *See, e.g., Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265 (1977) ("*Arlington Heights I*"); *Keyes v. School Dis-*

trict No. 1, 413 U.S. 189, 198 (1973). *See generally Washington v. Davis*, 426 U.S. 229, 239 (1976). The plaintiff need not show, however, that a government decisionmaker was motivated solely, primarily, or even predominantly by concerns that were racial, for

> "[r]arely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the 'dominant' or 'primary' one."

Arlington Heights I, 429 U.S. at 265 (footnote omitted). Rather, the plaintiff need begin only by showing that race was "*a* motivating factor." *Id.* at 266 (emphasis added). Once it is shown that a decision was motivated at least in part by a racially discriminatory purpose, the burden shifts to the defendant to show that the same result would have been reached even without consideration of race. *Id.* at 270 n.21; *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 287 (1977). If the defendant comes forward with no such proof or if the trier of fact is unpersuaded that race did not contribute to the outcome of the decision, the equal protection claim is established.

Yonkers III, 837 F.2d at 1217. *See also Arthur*, 573 F.2d at 142 ("A presumption of segregative purpose arises when plaintiffs establish that the natural, probable, and foreseeable result of public officials' action or inaction was an increase or perpetuation of public school segregation. The presumption becomes proof unless defendants affirmatively establish that their action or inaction was a consistent and resolute application of racially neutral policies." (internal quotation marks omitted)).

The requisite intent element may be established in a number of ways. "The foreseeability of a segregative effect, or 'adherence to a particular policy or practice, with full knowledge of the predictable effects of such adherence upon racial imbalance,' is a factor that may be taken into account in determining whether acts were undertaken with segregative intent." *Yonkers III*, 837 F.2d at 1227 (quoting *Columbus Board of Education v. Penick*, 443 U.S. 449, 465 (1979) (other internal quotation marks and modification omitted)); *see also Hart v. Community School Board of Education*, 512 F.2d 37, 46-48, 51 (2d Cir. 1975); *Oliver v. Michigan State Board of Education*, 508 F.2d 178, 183-84 (6th Cir. 1974), *cert. denied*, 421 U.S. 963 (1975). Other probative sources may include "[d]epartures from the normal procedural sequence," *Arlington Heights I*, 429 U.S. at 267, "[s]ubstantive departures . . . , particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached," *id.*, and patterns of official appointments that fill key positions with persons who are likely to maintain a segregated status quo, *see Yonkers III*, 837 F.2d at 1235.

In *Yonkers III*, we concluded that the forbidden segregative intent was established where governmental defendants took actions in response to and in accordance with community pressures that they knew were racially motivated:

> Even assuming . . . that the actions of the municipal officials are only responsive rather than leading the fight against desegregation, we conclude that the Equal Protection Clause does not permit such actions where racial animus is a significant factor in the community position to which the city is responding. . . .

Id. at 1224 (citing, *inter alia*, *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984)). We noted that

> [t]he Supreme Court has long held, in a variety of circumstances, that a governmental body may not escape liability under the Equal Protection Clause merely because its discriminatory action was undertaken in response to the desires of a majority of its citizens. . . . [In *Palmore v. Sidoti*], the Court stated as follows: "Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect. 'Public officials sworn to uphold the Constitution may not avoid a constitutional duty by bowing to the hypothetical effects of private racial prejudice that they assume to be both widely and deeply held.' " 466 U.S. at 433 (quoting *Palmer v. Thompson*, 403 U.S. 217, 260-61 (1971) (White, J., dissenting)).

Yonkers III, 837 F.2d at 1224. We cited with approval cases such as *Smith v. Town of Clarkton*, 682 F.2d 1055, 1063-66 (4th Cir. 1982), in which

> a town was found liable under the Equal Protection Clause [*inter alia*] for withdrawing from a joint plan to construct low-income housing, where its withdrawal was a response to town residents' opposition that was "motivated in significant part by racial considerations." 682 F.2d at 1063 . . . . *Though there was no evidence that the town officials themselves had a history of racially discriminatory acts or that in their individual capacities they were racially motivated*, the circuit court upheld the imposition of liability, stating that "[i]t is not necessary, in proving a violation of the equal protection clause, to show that the challenged actions rested

> *solely* on a racially-discriminatory intent in order to demonstrate that the involved officials acted with an intent to illegally discriminate," *id.* at 1066 (emphasis in original), and concluding that *there could be "no doubt that the defendants knew that a significant portion of the public opposition was racially inspired, and their public acts were a direct response to that opposition," id.*

Yonkers III, 837 F.2d at 1225 (emphases added except as indicated). We concluded that

> [i]t is sufficient to sustain a racial discrimination claim if it has been found, and there is evidence to support the finding, that racial animus was a significant factor in the position taken by the persons to whose position the official decision-maker is knowingly responsive.

Id. at 1226; *see also id.* ("City may properly be held liable for the segregative effects of a decision to cater to [the race-based] 'will of the people' "); *id.* at 1234 ("To the extent that the Board was being responsive to the wishes of segments of the community and the [City] Council, the imposition of liability on the Board was proper since the opposition to desegregative steps was racially motivated.").

Liability may be premised not only on action but on a refusal to act. *See, e.g., Arthur*, 573 F.2d at 141 (a finding of *de jure* segregation may be based on acts of commission or omission by governmental bodies which have the " 'natural and foreseeable consequence of causing educational segregation' " (quoting *Hart v. Community School Board of Education*, 512 F.2d at 50)). Thus, "[g]overnment officials may be held liable under § 1983 for a failure to do what is required." *Doe v. New York*

City Department of Social Services, 649 F.2d 134, 141 (2d Cir. 1981), *cert. denied*, 464 U.S. 864 (1983). *See also Duchesne v. Sugarman*, 566 F.2d 817, 832 (2d Cir. 1977) ("[w]here conduct of the supervisory authority is directly related to the denial of a constitutional right it is not to be distinguished, as a matter of causation, upon whether it was action or inaction"). Further, in *Comer v. Cisneros*, 37 F.3d 775 (2d Cir. 1994), we considered a claim that the commissioner of New York's Division of Housing and Community Renewal had improperly failed to use his authority to intervene in a municipal housing authority's operations to assure protection of state and federal civil rights. We observed *obiter* that "[i]f [the commissioner] did have authority to intervene, and he knew about the discriminatory practices in the tenant selection process, then he could be liable under 42 U.S.C. § 1983." *Comer v. Cisneros*, 37 F.3d at 804. Even if an official had no statutory duty to act, he may be liable if his refusal to act was a response to pressures that were known to be racially motivated. *See, e.g., Yonkers III*, 837 F.2d at 1218-19 (where site restrictions on low-income housing were imposed in response to pressures known to be racially motivated, the fact that the City had no duty to provide low-income housing was not significant); *see also LeBlanc-Sternberg v. Fletcher*, 67 F.3d 412, 425 (2d Cir. 1995) (housing restrictions with religious motivation), *cert. denied*, 116 S. Ct. 2546 (1996).

These principles govern the present case, for though the district court stated that it did not find that the State officials and UDC themselves performed affirmative acts of intentional discrimination, it found that the State knew of the segregation in Yonkers, had actual or constructive knowledge that the segregation was *de jure*,

had the power to take steps to remedy that segregation, and refused to exercise that power because they were capitulating to political pressures that they knew were racially motivated. In detail, the district court found, *inter alia*, that

> - the State was aware of circumstances that should have alerted it to Yonkers's unlawful segregation of its schools, and "if in fact the State defendants were not so alerted, it was because they themselves chose to remain ignorant" "in the face of actual conflicting evidence,"

Yonkers V, 880 F. Supp. at 219, 220;

> - the State had "actual or constructive[ ] knowledge of illegal racial segregation in the Yonkers public schools,"

id. at 220;

> - the State had "full knowledge of the nature, cause and extent of the segregation in the Yonkers public schools,"

id. at 245;

> - the State "knew that Yonkers," "if left to its own devices, was not going to remedy the segregation voluntarily,"

id. at 219, 220. The court also found, *inter alia*,

> - that in other communities, Commissioner Nyquist had "not hesitate[d] to enforce the [New York] racial integration policy,"

id. at 225;

> - that the legislature responded to Nyquist's desegregation efforts with a statute that "prohibited

State education officials, as well as local school districts with appointed school boards, from assigning students for the purpose of achieving racial balance or of taking other desegregative actions,"

id.;

- that, after that statute was declared unconstitutional, the legislature took other actions whose "purpose and intended effect" were "similar" and "had the cumulative effect of undermining efforts to reduce school segregation,"

id.;

- that the legislature also adopted "a new practice" of having candidates for the Board of Regents be "interviewed prior to appointment by legislators . . . who were known to be hostile to vigorous desegregation efforts,"

id.;

- that the Regents revised their policy statement on segregation so as to "dilute[ ] [its] pro-desegregation force,"

id.;

- that this revision was a response to "criticism of Commissioner Nyquist's vigorous desegregation efforts,"

id.;

- that the Board of Regents lobbied for legislation providing for stricter judicial review of the Commissioner's § 310 orders in an effort to "rein in Nyquist's desegregation efforts,"

id. at 226; and

> - that the Board of Regents finally simply fired Nyquist; "[h]is views on [integration] were a substantial factor leading to his discharge,"

id.

Thus, the district court found that the State had exhibited a "determined reluctance to enforce its own desegregation policy in Yonkers," *id.* at 224; that the State decided that "it would not force Yonkers to change," *id.*; and that that determined reluctance was a knowing response to increasing "opposition . . . to racial integration," *id.* at 225. In sum,

> the State determined not to take any affirmative action to deal with Yonkers school segregation because of political and other pressures, from within the Board of Regents and from without, which opposed vigorous desegregation efforts. These pressures can only be explained in racial terms.

Id. at 245.

Of these findings, the State has challenged only the finding that the State defendants knew or reasonably should have known that the segregation in Yonkers was *de jure* rather than *de facto*. We reject this challenge. The evidence before the district court included many SED documents and the testimony of several former SED officials, including Sobel, whose title was "Specialist in Educational Integration" and whose primary function related to racial imbalance and desegregation activities in local school districts. Documentary evidence revealed that SED had begun collecting annual statistics in 1966 with regard to the racial makeup of each school district as a whole and of each school within the district. Sobel, who joined SED in 1968, testified,

"We had figures which were reported by every school district annually, including racial breakdown of student body and professional staff and so on." (Deposition of Sobel at 176.) With respect to Yonkers, Sobel said, "[A]ll I had to do was to look at the numbers and see that there was racial imbalance existing." (*Id.*)

Sobel visited the schools in Yonkers and was aware that the predominantly minority schools tended to have worse physical plants, less recreation space, and more minority teachers, who tended to be less experienced than the teachers at predominantly white schools. (*See id.* at 257-58.) He testified, "I was in a district that was not integrated" (*id.* at 258-59), and that the minority schools were inferior.

SED also received letters and telephone calls from Yonkers residents "complain[ing] about predominantly or all minority schools." (*Id.* at 179.) Sobel testified, "we also had the figures so we knew what the situation was." (*Id.* at 178.) In 1968, for example, an SED official wrote to a Yonkers resident offering reassurance that SED was "working toward a reduction of racial imbalance" in the Yonkers schools. (Letter of Wilbur R. Nordos, assistant to SED Commissioner Allen, to Ruth Love, dated February 27, 1968.)

In early 1970, Nyquist wrote to the Yonkers Board of Education, pointing out that the October 1969 school racial census revealed that "your school district has a district-wide average of 13.1% minority group students. It further shows that of the 40 schools, 24 are at 10% or greater variance from the district-wide average, the greatest variance being 65% or more." (Letter of Commissioner Nyquist to President of the Yonkers Board of

Education at 1.) Nyquist asked the Board to respond by July 1970 with proposals for desegregation.

Though there was an initial brief response to Nyquist's letter, the Yonkers school superintendent died in September 1970, and Sobel thereafter viewed it as highly unlikely that the Board would proceed with any steps toward desegregation voluntarily. His view was not based on conjecture or surmise. School administrators told Sobel that there was community opposition to desegregation of the schools in Yonkers (*see* Deposition of Sobel at 259), and the acting superintendent told Sobel explicitly "that he [the acting superintendent] was not going to do anything. He said that very clearly" (*id.* at 122). One of the reasons stated by the acting superintendent for declining to take any action was that "if he [the acting superintendent] did move ahead in the area of desegregation, since he was a candidate for the superintendency it was his feeling that community resistance might impede his candidacy." (*Id.* at 122-23.) There was "absolutely[ ] no question" in Sobel's mind that the acting superintendent was correct, that if he took steps toward desegregation he "would encounter vocal opposition." (*Id.* at 126-27.)

Though often the local opposition to any SED offer of help was stated in terms of opposition to busing, Sobel testified that, in his experience, a stated "opposition to busing was a smoke screen for their opposition to racial integration . . . . [T]hose who opposed busing for desegregation purposes used that to support their opposition to racial integration. I never heard any of those people object to transporting children for other reasons." (*Id.* at 84.) Sobel's view was amply supported by, *inter alia*, the evidence presented at the first trial in this litigation; in *Yonkers III*, we noted that any suggestion that

"popular opposition to desegregative proposals was merely an opposition to busing, not to desegregation," was "entirely frivolous," 837 F.2d at 1231, given the fact that "[h]ostile white audiences from at least the early 1970's . . . told state and local school officials *in haec verba* that they did not want their children going to school with minority children," *id.* In light of the local opposition to desegregation, Sobel "was convinced that Yonkers was not going to move forward on its own" (Deposition of Sobel at 306), and he expected that it would not ask SED for help. His expectations were borne out. It was Sobel's view from September 1970 until he left SED in 1980, that Yonkers school officials were in default on their responsibilities to carry out the educational policies of New York State with respect to racial imbalance (*see id.* at 354-55), "that . . . Yonkers had serious problems with racial imbalance" (*id.* at 304), and "that the racial imbalance in Yonkers was getting worse" (*id.* at 292). By January 1976, data collected and analyzed by SED made it "evident that Yonkers was one of the most segregated school districts in the State of New York." (Deposition of former SED official Stanley C. Campbell at 72).

In sum, the record evidence amply supports the district court's finding that the State defendants had full knowledge of the nature, cause, and extent of the segregation in the Yonkers schools, and that they knew or should have known that the school segregation in Yonkers was *de jure*.

Further, there was ample support, and the State defendants do not appear to contend otherwise, for the court's finding that the failure of the SED officials to take action toward desegregation in Yonkers, though they took remedial action in other cities, was the result of

heavy pressure from the New York State legislature. Sobel testified, for example, that the perception in SED was that the New York Senate majority leader, who represented Niagara Falls, expressed doubts about continuing the legislative appropriation for SED's "Racial Balance Fund," which was used to help districts desegregate, because the majority leader opposed SED's racial balance plan for Niagara Falls. SED officials' view was that the senator "might decide to punish us" in order to curry favor with his constituents. (Deposition of Sobel at 383.) The legislature did thereafter stop making Racial Balance Fund appropriations.

The evidence also included the testimony of former Regent Theodore M. Black that in the early 1970s, state legislators took several steps to control the Board of Regents' efforts toward desegregation. Realizing that Nyquist served at the pleasure of the Board of Regents without a contract, the legislative leadership intensified its efforts to accelerate changes in that board's membership, shortening the Regents' term of office from 15 years to seven. Further, in about 1973, individual legislators began to interview candidates for Regent positions and in the interviews discussed the subject of busing; at least one Regent whose term was about to expire was very much in favor of busing, and he was not reappointed; an on-the-record opponent of busing was appointed instead. Black testified:

> It was not difficult to divine what the legislature was up to. They kept up the pressure on the Regents for two reasons: to hasten abandonment of the Regents[']pro-busing policy, and to hasten the dismissal of the commissioner who was blamed for it.

(Deposition of Black at 100.)

The legislature also cut SED appropriations. As Black characterized it, "If the Regents wouldn't give . . . Nyquist the sack, then the legislators would use their favorite weapon, money, to hack his top staff to pieces. It was a cruel time." (*Id.* at 132.)

Former Regent Kenneth Clark testified similarly that

> in the '70s, middle or late '70s, it became more and more clear that the legislature was moving toward restricting the activities of the Regents and the State Education Department in the area of desegregation of schools. Very strong and clear signals started to come that the legislature, probably responding to their clients [*sic*], were against busing, were against a continued aggressive approach to desegregation on the part of the Board of Regents.

(Deposition of Clark at 14.) He elaborated that

> the most obvious [signal] was that the legislature, in seeking to determine who would or would not be elected to the Board, would have interviews with prospective members or with those members of the Board of Regents whose term had come up and who were to be re-elected; that the interviews seemed clearly related to the litmus test of determining whether the prospective regent or the regent to be re-elected was or was not supportive of the legislature's position on anti-busing and desegregation. This was clear. And there was no question that the legislature was becoming more and more aggressive in blocking the school integration that was being pursued earlier by the Board of Regents.
>
> . . . .

> . . . [E]veryone knew . . . that the legislature, in exercising its power to select Regents, was also at the same time sending the signal that the Commissioner of Education at the time, Ewald Nyquist, was to be restrained in his powers as far as integration is concerned.

(*Id.* at 14-15, 22-23.)

The district court's amply supported factual findings distinguish the present case from *Arthur v. Nyquist* in at least two critical respects. First, with respect to Buffalo, the state officials took numerous steps in an attempt to have that city develop an effective desegregation plan. When the Commissioner found that *de facto* segregation existed in Buffalo, he ordered that city's board of education to submit a desegregation plan within three months; when he found the submitted plan to be inadequate, he rejected it and required a new plan; he appointed an advisory committee to help develop a satisfactory plan; when a satisfactory plan was eventually submitted, he approved it and ordered periodic reports on its implementation. When the approved plan was thwarted by the Buffalo city council's refusal to appropriate funds for it, the Commissioner, *inter alia*, ordered the school board to submit a new desegregation plan, and he sent members of his staff to Buffalo to work with the board. When all of those efforts failed, the Commissioner issued a show-cause order to the Buffalo board, threatening to exercise his statutory enforcement powers. Second, although we noted in *Arthur* that the state officials could have taken more drastic action, and that absent such action it was "[n]o[t] . . . unforeseeable that the Buffalo schools might remain segregated for an extended period of time," 573 F.2d at 146, we concluded that the state officials had rebutted any inference of seg-

regative intent arising from that foreseeability because they showed "legitimate policy considerations [that] warranted" their decision not to use more drastic remedies, presenting legitimate bases for viewing harsher measures as "inappropriate under the circumstances," *id.* We concluded that there was insufficient evidence in *Arthur* that the state officials abdicated their duties to attempt to achieve desegregation.

In sum, in *Arthur* there was evidence (a) that the state officials made substantial, repeated efforts to require Buffalo to develop and implement a desegregation plan, and (b) that the state officials' decision not to use more drastic measures was the result of legitimate considerations rather than of their capitulation to views they knew to be racially motivated. Thus, the evidence in *Arthur* as to SED's conduct and motivation with respect to Buffalo was materially different from the evidence in the present case with respect to Yonkers. *Arthur* did not warrant dismissal of the claims against the State for its conduct with respect to Yonkers.

Further, although the district court concluded in the present case that there was no evidence that SED officials ever gave "*specific* approval" to segregation in Yonkers, *Yonkers V*, 880 F. Supp. at 236 (emphasis in original), or intentionally took any "affirmative pro-segregative action," *id.*, and no evidence that the Board of Regents "was affirmatively in favor of segregation," *id.*, those conclusions are, in the circumstances here, not dispositive. The court permissibly found that the State acted in a way that had the effect of encouraging the perpetuation of *de jure* segregation and knew that through its actions and omissions it was capitulating to pressures that were racially motivated. This conduct falls squarely within the principles enunciated in *Yonkers III*, *see*, *e.g.*,

837 F.2d at 1224-26, 1232. Government officials, whether city or state, are not permitted to engage in deliberate conduct or deliberate omissions that have the foreseeable effect of perpetuating known segregation, where their acts or omissions are undertaken in response to and in accordance with the segregative wishes of others that are known to be racially motivated. Thus, though the district court posited that "a state's knowing failure to meet its obligation to eradicate segregation is insufficient to impose liability on the state," *Yonkers V*, 880 F. Supp. at 234, that statement is elliptical. It is not correct where the failure was the result of a knowing capitulation to racially inspired pressures rather than of any legitimate reasons. In the present case, the district court found no legitimate reasons.

The State defendants contend, however, that the judgment in their favor should be upheld on the basis that, under New York law, they lacked legal authority or responsibility to intervene in Yonkers to remedy the unlawful segregation. In light of the express provisions of New York statutory law, this contention need not detain us long.

Under the New York Education Law, SED, with the Board of Regents as its "head," and the Commissioner as its "chief administrative officer," is "charged with the general management and supervision of all public schools." N.Y. Educ. Law § 101; *see also id.* § 305(2) (Commissioner has "general supervision over all schools"). At all times pertinent to this litigation, the statute has provided that "*[n]o person shall be refused admission into or be excluded from any public school in the state of New York on account of race . . . .*" *Id.* § 3201(1) (emphasis added).

The statute provides that the Commissioner "*shall* enforce all general and special laws relating to the educational system of the state and execute all educational policies determined upon by the board of regents," *id.* § 305(1) (emphasis added); and it provides that he "*shall also have the power* and *it shall be his duty* to cause to be instituted such proceedings or processes as may be necessary to properly enforce and give effect to any provision in this chapter or in any other general or special law pertaining to the school system of the state or any part thereof or to any school district or city," *id.* § 308 (emphases added). *See also Arthur*, 573 F.2d at 146; *New York City School Boards Association v. Board of Education of the City School District of the City of New York*, 39 N.Y.2d 111, 116, 383 N.Y.S.2d 208, 211 (1976); *Vetere v. Allen*, 15 N.Y.2d 259, 267, 258 N.Y.S.2d 77, 80 (per curiam), *cert. denied*, 382 U.S. 825 (1965). In *Vetere*, the New York Court of Appeals noted that where the Commissioner and the Board of Regents find that racial imbalance in the schools of a given community has made the schools educationally inadequate, the Commissioner has virtually unreviewable authority under the Education Law to order student transfers in order to eliminate the imbalance.

Further, as the district court observed in the present case, the statute also gives the Commissioner various explicit powers that he may use in order to carry out his duty to enforce state educational laws and policies. *See, e.g.*, N.Y. Educ. Law § 306(2) (he may withhold state financial aid from any school district for willfully disobeying any law or order); *id.* § 310 (he may institute quasi-judicial proceedings); *id.* § 408 (he may withhold approval of purchase or building of new school facili-

ties); *id.* § 306(1) (he may remove school board officials).

Given the statute's clear impositions of duty and grants of power, the State defendants' twin disclaimers of responsibility and authority are meritless.

In sum, in *Yonkers III*, we were left with no doubt that the City and Board officials knew of the racial animus motivating most of the opposition to school or housing desegregation in Yonkers. On the present appeal, in light of the record supporting the findings made in *Yonkers V*, there is also no doubt (1) that SED officials (a) were aware that citizen opposition to desegregation in Yonkers was motivated by racial animus, (b) were aware that the local officials would take no action to achieve desegregation voluntarily, and (c) were aware that the refusals of City and Board officials to take action toward desegregation were designed to placate that racial animus; and (2) that the State defendants failed to exercise their authority and failed to fulfill their responsibility to take steps to achieve desegregation in Yonkers, and instead took actions that encouraged the perpetuation of segregation, because of their deference to the racially inspired positions of the local officials and the known anti-desegregation stance of other state officials.

As we said in *Yonkers III*, public officials may not, with impunity, give effect to private biases, either directly or indirectly. We conclude that, given the district court's amply supported findings of fact, the defendant State officials may properly be held liable under § 1983 on plaintiffs' claims for prospective injunctive relief to remedy vestiges of school segregation in Yonkers.

B. ***The EEOA Claims***

To the extent that plaintiffs' claims were asserted against New York State, SED, and the Board of Regents, (collectively the "State institutional defendants"), the claims properly were not upheld under § 1983, for those defendants have Eleventh Amendment immunity and hence are not considered to be persons suable under § 1983. *See, e.g., Howlett v. Rose*, 496 U.S. 356, 365 (1990); *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 71 (1989). *But see Hafer v. Melo*, 502 U.S. 21, 27 (1991) (an individual state official sued in his or her official capacity for injunctive relief is a person under § 1983 because "official-capacity actions for prospective relief are not treated as actions against the State" (internal quotation marks omitted)); *Will v. Michigan Dept. of State Police*, 491 U.S. at 71 n.10 (same). Nonetheless, plaintiffs were entitled to prevail against the State institutional defendants under the EEOA, which contains prohibitions directed expressly against the states and their agencies.

The EEOA (or the "Act") provides that "*[n]o State* shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin." 20 U.S.C. § 1703 (emphasis added). Further, the Act forbids the state to perpetrate such a denial through various acts or omissions of an "educational agency." *See id.* §§ 1703(a)-(f). The Act defines "educational agency" as "a local educational agency *or* a '*State* educational agency.' " *Id.* § 1720(a) (emphasis added); *see also Idaho Migrant Council v. Board of Education*, 647 F.2d 69, 71 (9th Cir. 1981) (educational agency as used in EEOA includes a "state board of education"). It provides that the state may be held liable for, *inter alia*,

> (c) *the assignment by an educational agency of a student to a school, other than the one closest to his or her place of residence within the school district in which he or she resides*, if the assignment results in a greater degree of segregation of students on the basis of race, color, sex, or national origin among the schools of such agency than would result if such student were assigned to the school closest to his or her place of residence within the school district of such agency providing the appropriate grade level and type of education for such student;
>
> (d) *discrimination by an educational agency* on the basis of race, color, or national origin *in the employment, employment conditions, or assignment to schools of its faculty or staff* . . . .

20 U.S.C. §§ 1703(c) and (d) (emphases added).

The legislative history of the EEOA "is very sparse, indeed almost non-existent." *Castaneda v. Pickard*, 648 F.2d 989, 1001 (5th Cir. 1981). The Act itself, however, in providing explicitly that "[n]o State" shall engage in the prohibited conduct and in including within the prohibition acts by "State educational agenc[ies]," obviously reflects Congress's intention to hold the states and their agencies liable. We thus view the EEOA as expressly abrogating the states' Eleventh Amendment immunity to the extent necessary to effectuate the purposes of the EEOA. *Accord Gomez v. Illinois State Board of Education*, 811 F.2d 1030, 1038 (7th Cir. 1987) ("the EEOA expressly contemplates that relief is to be obtained from the state and its agencies"); *Board of Education of Peoria, School District No. 150 v. Illinois State Board of Education*, 810 F.2d 707, 712 (7th Cir.) (EEOA

"requires that the *state* ensure compliance" (emphasis in original)), *cert. denied*, 484 U.S. 829 (1987).

As a substantive matter, the EEOA provides protections similar to those provided by the Equal Protection Clause. In enacting the EEOA, Congress

> declare[d] it to be the policy of the United States that-
>
> (1) all children enrolled in public schools are entitled to equal educational opportunity without regard to race, color, sex, or national origin; and
>
> (2) the neighborhood is the appropriate basis for determining public school assignments.

20 U.S.C. § 1701(a). Congress's purpose was to "specify appropriate remedies for the orderly removal of the vestiges of the dual school system." *Id.* § 1701(b). Thus, the Act provides substantive protections that "considerabl[y] overlap . . . those provided under the fourteenth amendment," *United States v. School District of Ferndale, Michigan*, 577 F.2d 1339, 1346 (6th Cir. 1978); *see also Castaneda v. Pickard*, 648 F.2d at 1001 ("the elements of plaintiff's cause of action for discrimination in the hiring and promotion of teachers and administrators under the [EEOA] are the same as the elements of their claims premised on the fourteenth amendment and § 1983"); *United States v. Hinds County School Board*, 560 F.2d 619, 623 (5th Cir. 1977) (rights conferred by EEOA go beyond those provided by the Fourteenth Amendment).

The EEOA also imposes on states the obligation to enforce the equal-educational-opportunity obligations of local educational agencies. *See, e.g., Idaho Migrant Council v. Board of Education*, 647 F.2d at 71 (state's

department of education, board of education, and superintendent of public instruction have "an obligation to supervise the local districts to ensure compliance"). In *United States v. School District of Ferndale, Michigan*, for example, the government alleged, *inter alia*, that

> [t]he State defendants, notwithstanding their knowledge that the Ferndale elementary schools were being operated by defendant local school authorities on a racially segregated and discriminatory basis, have nevertheless continued to aid and assist the perpetuation and maintenance of that racial segregation and discrimination through the provisions of state funds and other assistance, while failing and refusing to take any necessary or appropriate action to bring the operation of the Ferndale elementary schools into compliance with the Fourteenth Amendment to the United States Constitution.

577 F.2d at 1347. The district court in that case "apparently felt that the [EEOA] applied only to direct acts of discrimination, not to indirect assistance to districts violating the Act," and dismissed the EEOA claims against the state on the ground that "it was not the 'educational agency' that allegedly committed the proscribed discriminatory acts." *Id.* (footnote omitted). The Sixth Circuit reversed, stating that a proper EEOA claim is stated by the allegation that the state "*tolerated and provided assistance to a local school district which [it] knew to be engaging* in" the "discriminatory assignment of students and teachers," *id.*:

> *We do not believe that the State can escape liability under the Act merely because its support for the proscribed actions was indirect.* This Court has previously noted the substantial control exerted by

> Michigan state officials over local school operations. . . . In another Michigan desegregation case, we expressly ruled that state officials could be held jointly responsible with local authorities for segregated conditions in local schools, where the state officials had shown "consistent inaction in preventing increased segregation" and had consistently provided funding and other assistance to the local district. . . . Although that claim arose under the fourteenth amendment, *we think the principle of joint liability is applicable here as well. Congress plainly intended that the practices listed in § 1703 be ended. Such a goal can only be subverted by allowing states to knowingly support the prohibited practices with impunity.* This is particularly true where state assistance forms a sizable part of the local school district's budget. We seriously doubt that Congress intended to allow states to bankroll dual school systems, while enacting a statute specifying remedies for the *elimination* of such systems.

Id. at 1347-48 (footnotes omitted; last emphasis in original).

We agree, and, given the discussion in Part II.A. above, we find these principles squarely applicable to the conduct of the State institutional defendants with respect to Yonkers. The district court in the present case correctly stated that "the literal and unambiguous language of section 1703 . . . seem[s] to impose on states . . . supervisory liability." *Yonkers VI*, 888 F. Supp. at 594 (citing *Yonkers V*, 880 F. Supp. at 239-41); *see also Yonkers V*, 880 F. Supp. at 239 ("if one were to set about to write a statute in a way that provided for vicarious state liability, one could not find language that was more clear and direct than that contained in § 1703 of the

EEOA"). But the court believed that "supervisory" liability for the known acts of local and state entities was foreclosed by *Arthur*. It expressed the view that "Congress did not intend the statute to afford protections against racial discrimination beyond those already provided under the Fifth and Fourteenth Amendments of the Constitution," and that thus the EEOA should not be construed to impose on the states the very same "type of supervisory liability" that the court had found to be "foreclosed under 42 U.S.C. § 1983" by reason of *Arthur*. *Yonkers VI*, 888 F. Supp. at 594; *see also Yonkers V*, 880 F. Supp. at 240 ("the language of the EEOA on its face appears to impose on the states the very type of supervisory liability for the conduct of local actors that the *Arthur* decision foreclosed"). For the reasons stated in Part II.A. above, we have rejected the district court's view of *Arthur* with respect to the scope of the constitutional provisions; for the same reasons, we reject its view that the scope of the EEOA is similarly circumscribed. Plaintiffs' claims against the State, SED, and the Board of Regents under the EEOA should have been upheld.

The district court also noted that were it to uphold plaintiffs' claims under the EEOA, it would be required to revisit the question of the appropriate remedy for such a violation. The court correctly noted that the EEOA requires the court to make specific findings as to whether a denial of equal educational opportunity may be remedied by a method or combination of methods that does not include busing. However, the Act merely prioritizes methods, and does not eliminate busing. The Act itself states that while the EEOA is meant to "specify appropriate remedies for the elimination of the vestiges of dual school systems," 20 U.S.C. § 1702(b), its pro-

visions "are not intended to modify or diminish the authority of the courts of the United States to enforce fully the fifth and fourteenth amendments to the Constitution of the United States," *id.* Thus, while the EEOA "manifests a purpose . . . to guide and channel" judicial power, it is not to be construed to "restrict the breadth of discretion of th[e] court to determine what scope of remedy is constitutionally required." *Morgan v. Kerrigan*, 530 F.2d 401, 413 (1st Cir.), *cert. denied*, 426 U.S. 935 (1976); *see also Brinkman v. Gilligan*, 518 F.2d 853, 856 (6th Cir.) (construing the EEOA "as not limiting either the nature or the scope of the remedy for constitutional violations"), *cert. denied*, 423 U.S. 1000 (1975).

Though in fashioning its remedial order at the outset the district court had not made the findings required for an order under the EEOA, it should make such findings on remand with respect to any remedial order to be fashioned and imposed on the State and its agencies.

C. ***Title VI***

In light of our conclusions that the defendant State officials may be held liable under § 1983 and that the State, SED, and the Board of Regents may be held liable under the EEOA, we need not address plaintiffs' challenges to the district court's rejection of their claims under Title VI.

D. ***The Claims With Respect to Housing and UDC***

The rejection of plaintiffs' claims against the State with respect to the segregative placement of new subsidized family housing, and that placement's effect of perpetuating and exacerbating segregation in the Yonkers schools, was premised on the district court's view that

the present case was not meaningfully distinguishable from *Arthur*. The district court should reconsider its dismissal of these claims in light of our discussion in Part II.A. above.

Likewise, the district court's ruling that the claims against UDC are barred by the statute of limitations should be reconsidered within the framework of our discussion in Parts II.A. and B. The cornerstone of the district court's analysis of whether the claims against UDC were timely, on the theory that UDC might be held liable for a "continuing wrong," was the court's view of the substantive extent of UDC's liability. The court began with the proposition that a duty to take steps to eliminate the effects of past school segregation will be imposed on a governmental entity only if it had a "*pervasive* role in matters *directly* affecting school attendance zoning," *Yonkers V*, 880 F. Supp. at 243 (emphases added), and it found that UDC had no direct or pervasive role. This view of the substantive extent of a governmental entity's liability was consistent with the district court's interpretation of *Arthur*.

As discussed above, however, a public entity may be held liable for the discriminatory effects of its knowing action or inaction in capitulation to the wishes of others that are known to be racially motivated; its role need not be direct or pervasive; it may be liable even if its conduct furthers the racially inspired goals only indirectly. Further, in the context of unlawful school segregation, state agencies or officials whose actions have contributed to that segregation have a duty "to take the necessary steps 'to eliminate from the public schools all vestiges of state-imposed segregation.' " *Milliken v. Bradley*, 433 U.S. 267, 290 (1977) (quoting *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1,

15 (1971)). "Each instance of a failure or refusal to fulfill this affirmative duty continues the violation of the Fourteenth Amendment." *Columbus Board of Education v. Penick*, 443 U.S. at 459.

The district court's findings in the present case leave no doubt that UDC played a role in the perpetuation of school segregation in Yonkers. As the district court noted, there was a "close interrelationship between school segregation and segregative housing patterns in Yonkers, each affecting and aggravating the other." *Yonkers V*, 880 F. Supp. at 241; *accord Yonkers III*, 837 F.2d at 1234-35. The court found that UDC "worsened the already segregated state of housing and schools in the City" by its "knowing[ ] acquiesce[nce] and indeed participat[ion] in the segregative site selections." *Yonkers V*, 880 F. Supp. at 229. Thus, the perpetuation and exacerbation of segregated housing through UDC's participation in the placement of low-income housing only in heavily minority neighborhoods has had long-term segregative effects on the schools. These effects were easily foreseeable. SED officials were generally "very much aware of the problems" and had internal discussions "about the effect of publicly subsidized housing on racial imbalance in the schools" (Campbell Deposition at 62, 61); and they were aware "[t]hat Yonkers was going to build subsidized housing which would enhance segregation" (Sobel Deposition at 223). A City advisory group "relay[e]d concerns about racial imbalance in . . . schools in Yonkers to the UDC employees" (Trial Transcript at 710-11 (testimony of Yonkers Community Advisory Council member)); and the Yonkers City Manager testified that UDC's housing activity was reviewed by him and the Board of Education and that "all th[e] information" as to housing place-

ment's "consequences on school enrollment" was "share[d] . . . with the UDC" (*id.* at 662). UDC did not persuade the district court that it had any legitimate reason for its acquiescence in segregative housing placements; the only reason found by the court was UDC's "aware[ness] of strong local opposition to the building of subsidized housing in the predominantly white areas," *Yonkers V*, 880 F. Supp. at 228.

Despite the evidence and the findings, it is unclear that the district court, in light of its view of *Arthur*, would have concluded, leaving aside any statute-of-limitations defense, that UDC had any liability whatever with respect to school segregation because the court found that UDC's role was not pervasive or direct. And it is unclear whether, in concluding that there was no "continuing" liability for purposes of the statute of limitations, the court's view of the temporal extent of UDC's liability was independent of its unduly restrictive view of the potential substantive extent of that liability. In sum, the court apparently viewed UDC as having committed no actionable wrong, and that view, which we have rejected, may well have affected the court's assessment of the degree to which the wrong could be deemed a "continuing" wrong.

We conclude that, in light of our rejection of the court's conclusion that governmental actors could not be held liable on the basis of the facts established here, it is appropriate for the district court, in the first instance, to reconsider its view of the duration of UDC's liability.

CONCLUSION

For the reasons discussed above, the judgment of the district court dismissing the claims against the State defendants and UDC is vacated, and the matter is remanded for further proceedings not inconsistent with the foregoing.

January 13, 1997
Order of the Court of Appeals
Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Dkt No.: 95-6182
Filed: January 13, 1997

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 13 day of January one thousand nine hundred and ninety-seven.

USA,

Plaintiff,

—v.—

YONKERS BOARD,

Defendant-Appellant.

A petition for rehearing containing a suggestion that the action be *reheard* in banc having been filed herein by the appellees The State of New York.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT
GEORGE LANGE III, Clerk

By: /s/ ARTHUR M. HELLER
Arthur M. Heller
Administrative Attorney

March 27, 1995
Opinion of the District Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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80 Civ. 6761 (LBS)
March 27, 1995
HONORABLE LEONARD B. SAND, U.S.D.J.

UNITED STATES OF AMERICA,

Plaintiff,

—and—

YONKERS BRANCH, NAACP, et. al.,

Plaintiff-Intervenors,

—against—

CITY OF YONKERS, YONKERS COMMUNITY DEVELOPMENT AGENCY, YONKERS BOARD OF EDUCATION,

Defendants,

—and—

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, SAMUEL PIERCE, SECRETARY,

Added-Defendants,

—and—

THE STATE OF NEW YORK; MARIO CUOMO, as GOVERNOR OF THE STATE OF NEW YORK; THE BOARD OF REGENTS OF THE STATE OF NEW YORK; MARTIN C. BARELL, R. CARLOS CARBALLADA, ADELAIDE L. SANFORD, WILLARD A. GENRICH, EMLYN I. GRIFFITH, JORGE L.

BATTISTA, LORA BRADLEY CHODOS, LOUISE P. MATTEONI, EDWARD MEYER, FLOYD S. LINTON, SALVADORE SCLAFINI, MIMI LEVIN LIEBER, SHIRLEY C. BROWN, NORMA GLUCK, THOMAS FREY and JAMES MCCABE, SR., in their official capacities as members of the State Board of Regents; THE DEPARTMENT OF EDUCATION OF THE STATE OF NEW YORK; THOMAS SOBOL, as COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK; and THE URBAN DEVELOPMENT CORPORATION of the STATE OF NEW YORK and VINCENT TESE, as Director of the Urban Development Corporation,

Added-Defendants.

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OPINION

SAND, J.

In response to the efforts of the Yonkers Board of Education ("YBE") and the Yonkers Branch, NAACP (collectively, "plaintiffs") to add as defendants the State of New York, the State Board of Regents, and various other State education officials (collectively, "the State"), as well as the Urban Development Corporation ("UDC") and its director, this Court has held a number of hearings and issued several opinions, familiarity with which we assume herein. *See United*

States v. Yonkers, 833 F.Supp. 214 (S.D.N.Y. 1993) (holding that vestiges of segregation persist in the Yonkers Public School System); *United States v. Yonkers*, No. 80 Civ. 6761, 1992 WL 176953 (S.D.N.Y. July 10, 1992) (denying the State's motion for summary judgment); *United States v. Yonkers*, No. 80 Civ. 6761, 1989 WL 88698 (S.D.N.Y. August 1, 1989) (denying the State's motion to dismiss), *appeal dismissed*, 893 F.2d 498 (2d Cir. 1990).

Following the last determination as to vestiges, the Court has conducted an exhaustive inquiry[1] into the question of liability of the State and the UDC for the condition of unlawful *de jure* segregation which this Court has previously found to exist in the Yonkers Public School System. *United States v. Yonkers Bd. of Educ.*, 624 F.Supp. 1276 (S.D.N.Y. 1985), *aff'd*, 837 F.2d 1181 (2d Cir. 1987), *cert. denied*, 486 U.S. 1055 (1988).[2]

By consent of the parties, there was established as a cut-off date for purposes of this inquiry the date of this Court's November, 1985 Opinion holding the City of Yonkers liable for the segregated conditions the Court found to exist. The virtue of the 1985 cut-off date is, of course, that it enables greater utilization of the record compiled in the original liability proceedings and permits the question to be posed whether the Court would have found the added State defendants to be liable had they been named as parties in the original proceedings. There was reserved to the parties the right

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[1] The YBE and NAACP introduced testimony of 31 witnesses and deponents and approximately 200 exhibits as well as three sets of admissions dealing with undisputed issues. The State also called several witnesses and introduced substantial documentation.

[2] In our vestiges opinion, we relied upon a comparison of achievement scores of minority and majority students *within* the Yonkers school district in concluding that minority students in Yonkers were not being afforded equal educational opportunities. Thus, the issue which is arguably before the United States Supreme Court in *Missouri v. Jenkins*, No. 93-1823 (U.S. argued Jan. 11, 1995), in which petitioner alleges that the trial court impermissibly engaged in a comparison of student test results in the school district in question with student test results in other (*i.e.*, suburban) districts, was not before this Court.

to present evidence concerning the period November, 1985 to date as part of a subsequent remedy proceeding, should such be deemed appropriate.

The Court has gathered from the parties, especially from counsel for the NAACP, who proffered evidence concerning post-1985 events, that any such evidence would be of a cumulative nature and not qualitatively different from the vast submissions already made. Such evidence, while perhaps pertinent to remedy, would seem to have little impact on questions of liability. We have therefore proceeded to determine questions of State liability on the basis of the present record. If a party is of the opinion that post-1985 evidence would alter any of the legal or factual conclusions set forth in this Opinion, and wishes for that reason to reopen these proceedings, the Court should be so advised in writing no later than 20 days from the date of this Opinion. The writing should set forth a description of the evidence that the party would seek to introduce and the reasons why it is believed that such additional evidence would lead to a change in the rulings made herein.

I.

CONTENTIONS OF THE PARTIES

The YBE and NAACP contend that the State contributed to the segregated status of the Yonkers Public Schools in several ways. The major emphasis has been on the alleged failure of the State officials primarily charged with education duties, *i.e.*, the members of the Board of Regents, the Commissioner of Education, and representatives of the Department of Education of the State of New York ("SED"), "to execute [State] education policy on racial integration and in impeding the implementation of that policy by local school officials in Yonkers." Yonkers Board of Education's Post-Trial Brief on State Liability Issues ("YBE Post-Trial Brief") at 2. Further, it is claimed that the State "unlawfully established an 'explicit racial' classification by singling out the racial inte-

gration policy as the one State education policy that would not be executed in accordance with the normal process of governance and decision making for education in New York State." *Id.* Independently of these grounds for the imposition of liability, the YBE and NAACP contend that the State is liable because of its participation in the development of housing in Yonkers which had a "known and foreseeable segregative effect on the public schools of Yonkers." *Id.* at 2-3.

The State asserts various defenses to these charges, including those of sovereign immunity and other jurisdictional defects. With respect to the housing claims, the State raises the defenses of statute of limitations and laches. On the merits, the State asserts that this case is controlled by *Arthur v. Nyquist*, 573 F.2d 134 (2d Cir.), *cert. denied*, 439 U.S. 860 (1978), and that the YBE and NAACP's claims that the State could and should have more aggressively pursued efforts to end segregation have already been rejected as a basis for asserting liability against the State. The State further asserts that the YBE and NAACP have failed to prove that the actions of either the UDC or the State defendants with respect to housing caused segregative consequences to the Yonkers Public School System. The City of Yonkers supports the position of the YBE and NAACP that the State is liable for contributing to such conditions of segregation which the Court has found to exist in Yonkers.

II.

FINDINGS OF FACT

A. *Schools*

The YBE and NAACP claim that there is a causal relation between the acts and omissions of the State and the continuation of segregation in the Yonkers Public School System. The gist of their argument is as follows: that the State was aware of the severely segregative conditions that existed in the Yonkers Public Schools; that the State had the legal

authority as well as the practical power to intervene in Yonkers and to compel Yonkers officials to take steps to remedy those conditions; that State officials, motivated by a fear of controversy, an aversion to aggressive efforts at integration, and, in some instances, racial prejudices, effectively adopted a hands-off policy toward Yonkers, whereby the State would act in support of desegregation only if invited to do so by an individual complainant or by the Yonkers authorities themselves; and that this hands-off policy had the foreseeable effect of preserving the segregative conditions in the Yonkers Public Schools.

Having reviewed the entire record, the Court finds there to be ample evidence supporting the plaintiffs' contentions regarding the nature of the State's desegregative posture prior to 1985. Our specific factual findings are outlined directly below. In a later section, we will explain why the facts, as found, nonetheless do not provide a basis for holding the State liable as a constitutional joint tortfeasor under 42 U.S.C. § 1983, and why we do not reach the merits of possible State liability under The Equal Educational Opportunities Act of 1974, 20 U.S.C.A. § 1701 *et seq.* (West 1990).

1. *What the State Knew*

There can be no doubt that the State was aware early on of the existence of at least *de facto* segregation in the Yonkers Public Schools. The record in this area begins with a February, 1968 letter from Yonkers resident Ruth Lowe to then-State Education Commissioner James E. Allen, informing him that

> Yonkers public schools really need investigation—especially those in the predominantly Black ghetto areas. School 19 is a perfect example. This school has de facto segregation. Additionally, areas have been gerrymandered to keep this school segregated. . . . Something should be done to break up the All White and All Black schools of Yonkers. Can you do anything?

YBE Exh. 16-20. Commissioner Allen's assistant, Wilbur Nordos, wrote Ms. Lowe back that it was his hope that his division—the Division of Intercultural Relations, which at the

time had the primary responsibility for promoting racial integration in New York schools—could "be of help to the school authorities in Yonkers in working toward a reduction of racial imbalance in the schools of that City." *Id.* Whether intended to be that help or not, SED staff member Norman Kurland showed up in Yonkers several months later, telling a Yonkers audience that, from the data available, it was evident that

> there is great inequality in the schools of Yonkers. In the six schools with 31 percent or more Negro students, and the greatest concentration of Negro students in the City, we find these schools to be persistently below the minimum competence level. . . . With only 11 percent of Negro student[s], racial balance can be achieved easily. Right now they are concentrated into six schools. A more integrated system is most effective.

YBE Exh. 16-21 at 1, 4; *see also* Transcript of Trial Proceedings Dated April 20-21, 26-28, May 2-4, 9-12, 16-18, 23-25, 1994 ("Tr.") 387-89 (Siragusa).

During the years 1970-80, the SED formed a clearer picture of the segregative conditions in the Yonkers schools. In June, 1970, Commissioner Ewald B. Nyquist wrote Charles Curran, President of the YBE, that nearly one-fourth of the schools in Yonkers were at a 10% or greater variance from the district-wide average number of minority group students; Nyquist then reminded Curran of the Board of Regents' "recommendation" that student bodies reflect a cross-section of the entire school district, and requested that Curran report within one month on the steps being taken to eliminate segregation. YBE Exh. 16-32. In 1971, Yonkers was recognized as a potential "trouble-spot" that could benefit from "action" to reduce racial imbalance. YBE Exh. 16-44 at 4. When SED staff went to work on a comprehensive plan for school desegregation, pursuant to which the State would intervene in school districts exhibiting racial imbalance, Yonkers appeared as the second priority on a list of districts to be addressed. YBE Exh. 16-62.[3]

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[3] "There is serious imbalance in this district," wrote one SED staff member, "with almost two-thirds of the schools out of balance." YBE Exh. 16-46B.

When the SED was working with a task force in Yonkers to facilitate funding for school desegregation during the years 1975-76, it acknowledged that "Yonkers is the fourth largest district in the State. It is substantially segregated." YBE Exh. 16-71 at 2; *see also* Deposition of Leroy L. Ramsey, Dated May 3, 1990 ("Ramsey Dep."), at 29-31, 42. Finally, Gordon Ambach, Commissioner of Education from 1977 to 1987, testified that he had continuing knowledge while Commissioner of the racial imbalance in the Yonkers schools. Tr. 1447 (Ambach).[4]

In addition to knowing that segregation existed in the Yonkers schools, the SED can fairly be charged with knowing that Yonkers, if left to its own devices, was not going to remedy the segregation voluntarily. As will be discussed more fully below, there were two moments when self-initiated reform from within Yonkers seemed possible: the period 1970-71 and the period 1975-1978. In both instances, local residents in Yonkers opposed local reform; in both instances, the local reform impulse petered out; and in both instances, SED personnel were aware that no progress had been made. *See* YBE Exhs. 16-36; 16-46B at 29; Sobel Dep. at 121-27, 181-83, 191; Ramsey Dep. at 58-60, 80-84; Tr. 1448-49, 1453 (Ambach). While SED personnel may have hoped that Yonkers officials would make a "real demonstration of good will and effort" in a desegregation campaign, YBE Exh. 16-46B at 29, they had hard evidence before them indicating that such cooperation would not be forthcoming.

The closer question regarding the extent of the State's knowledge is whether the State was aware of the fact that the segregation in the Yonkers schools was *de jure* rather than *de*

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[4] The State was kept informed of the segregative conditions in the Yonkers schools primarily by virtue of statistical information depicting the racial composition of school districts and particular school buildings which the SED required local school personnel to submit. *See, e.g.*, Deposition of Stanley C. Campbell, Dated November 28, 1990 ("Campbell Dep."), at 37-38; Ramsey Dep. at 22-26; Deposition of Morton J. Sobel, Dated April 17, 1990 ("Sober Dep."), at 176; Tr. 61-62 (Sheldon). These "racial censuses" began in 1966 and continued annually thereafter. YBE Exh. 16-50 at 2.

facto. The State clearly knew that the Yonkers schools were segregated; but did it know that the segregation was due to the intentional segregative practices of Yonkers officials? Several former State education officials testified that they themselves did not have such knowledge. Ramsey Dep. at 65-66; Tr. 1468 (Ambach). Indeed, it was suggested that State education personnel generally did not inquire into whether any given instance of school segregation in New York was *de facto* or *de jure* because they did not need to know: it was thought that the segregation of students along racial lines deserved to be combatted whatever its cause, since it posed an inherent threat to the quality of elementary and secondary school education. Ramsey Dep. at 65-67; *see also* YBE Exh. 4-15, "Special Message From the Commissioner," Dated June 14, 1963 ("Public education in such a situation [of racial segregation] is socially unrealistic, blocking the attainment of the goals of democratic education . . . *whether the situation occurs by law or by fact*") (emphasis added). It is also to be noted that the statistics relied upon by the SED to inform itself of the racial composition of individual schools and districts, *see supra* note 4, apparently did not disclose the cause of the racial breakdown. Tr. 2724-25 (Griffith).

Nevertheless, the Court finds that the State defendants were aware of circumstances that should have alerted them to the likelihood that Yonkers had a substantial problem of unlawful segregation in its schools. The Court further finds that if in fact the State defendants were not so alerted, it was because they themselves chose to remain ignorant.

To begin with, SED officials knew that *de jure* segregation had been found to exist in New York State in the past, and that it was therefore not unthinkable that it should exist there again at some point. *See* YBE Exh. 3-8c at 4, "A Review of the Recent Legal History of School Desegregation as Prepared by the Office of the Counsel, New York State Education Department," Dated September 12, 1969 ("[o]ne Court found that the New Rochelle school district in our own State was acting unlawfully when it gerrymandered attendance zone lines so as to perpetuate a high degree of racial imbalance . . . ."). There is also evidence that SED officials were aware

as early as the mid-1970's that there was a substantial over-representation of minority students in Yonkers special education classes—a state of affairs that could hardly be explained by the usual adventitious factors, such as housing patterns, which produce *de facto* segregation and which are constitutionally neutral. *See* YBE Exhs. 16-60 at 7; 16-85; 17-20 at 3; Campbell Dep. at 74-77; Ramsey Dep. at 67-69; Tr. 1008-13, 1066-67 (Batista); Tr. 1760-63, 1774 (Cox-Gerlock).[5] Finally, there is evidence that some SED staff knew during the mid-to-late 1970's that Yonkers was planning to build subsidized housing in a way that would aggravate segregation. *See* Sobel Dep. at 223.

Yet, despite these various warning signals, there is no evidence that SED officials ever took any steps to investigate the causes of racial segregation in the special education classes, or, for that matter, the causes of the increasing segregation in the regular classes. The Regents, for one thing, appear to have studiously avoided discussing the issue of school segregation after about 1975. *See* Tr. 920-21 (Keyes); Tr. 2421-23 (Carr); Tr. 2625, 2627-28 (Griffith); Tr. 2782-83 (Genrich). And the sole inquiry that is documented in the record—a report by SED Counsel Robert Stone to Commissioner Ambach in 1980 on whether *de jure* segregation on the basis of race existed in any school district in New York—was superficial and did not represent a serious inquiry into whether *de jure* segregation existed in New York schools or not.[6]

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[5] Racial segregation in the special education classes was one of the unlawful conditions in the Yonkers schools that federal authorities found to exist, and decided to prosecute, in 1980. *See* YBE Exh. 17-120 at 3.

[6] Commissioner Ambach had requested Stone to report to him on whether *de jure* segregation existed in any educational institution in New York. YBE Exh. T. Stone responded with the conclusory statement:

> I assume that the . . . reference to *de jure* segregation relates to segregation on the basis of race, color or national origin, and does not relate to segregation or distinctions based on such other factors as age or sex.
>
> Based upon that assumption, and since *de jure* of course means arising out of a legal requirement, I think we can say with con-

On the whole, the Court finds that State education officials chose to assume that the segregation they were tracking in Yonkers was *de facto* rather than *de jure*, and that they chose to make this assumption not only without any positive foundation for it but in the face of actual conflicting evidence relating to special education and subsidized housing construction. Moreover, we find no basis in the record for the suggestion that it was the State's commitment to the cause of rooting out all segregation, whatever its type, which made it blind to the actual causes of the segregation in the Yonkers schools.

In sum, the Court finds that the State knew about the segregation that existed in the Yonkers Public Schools, knew that Yonkers would not on its own take the steps necessary to end the segregation, and either knew or reasonably should have known that the segregation was *de jure* rather than *de facto*.

2. *What the State Had the Power to Do*

The next question is: given its (actual or constructive) knowledge of illegal racial segregation in the Yonkers schools, what, if anything, could the State do about it? The answer is: a great deal. New York law has prohibited *de jure* segregation since 1900. *See* N.Y. Educ. L. § 3201(1) (McKinney 1995). As early as 1960, the New York State Board of Regents issued a policy statement urging school districts to take the steps necessary to end *de facto* desegregation in New York's public schools. YBE Exh. 3-1. The Regents reaffirmed that position in a series of subsequent racial integration policy statements. *See* YBE Exhs. 3-7; 3-12; 11-17; 17-44. These policy statements could have been enforced by the Commissioner in several different ways.

Section 306 of the Education Law, for example, invests the Commissioner with the authority to remove school officials who fail or refuse to comply with "any decision, order, rule or

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fidence that *de jure* segregation on the basis of race, color or national origin does not exist in any school district or educational institution in this State.

YBE Exh. U.

regulation of the regents or of the commissioner . . . ." N.Y. Educ. L. § 306(1) (McKinney 1988). The Commissioner also has the authority under this provision to withhold state financial aid from an offending school district. *Id.* § 306(2). Although the calls for local action made in the Regents' racial integration policy statements did not amount to "orders," "rules," or "regulations," *per se*, testimony given at trial indicated that they could in fact have served as the basis for § 306 sanctions against non-complying school districts. *See* Tr. 2255-56 (Stone); Tr. 2788-89, 2816-19 (Genrich).

In a similar vein, § 310 of the Education Law gives the Commissioner the authority to institute, either on his own initiative or at the behest of a private citizen, quasi-judicial proceedings designed to enforce State education policies.[7] Such policies would undoubtedly include the objectives enunciated in the Regents' racial integration policy statements. *See* Tr. 2236-39 (Stone); Tr. 2819 (Genrich).

As a third option, the Commissioner and the Regents could have taken a regulatory approach to the problem of continuing segregation in the schools. That is to say, the Commissioner and the SED, working with the approval of the Regents, could have issued regulations requiring school districts to develop and submit plans for desegregating their schools, and could then have set up an enforcement apparatus consisting of site visits and compliance reports to ensure that such plans were in fact being carried out. See Tr. 2248-51, 2261-62 (Stone); Tr. 2781 (Genrich) (the Regents looked to the Commissioner to instruct school districts to develop desegregation plans within a certain time frame).

As a fourth option, the Commissioner could have used his authority under § 408 of the Education Law to ensure that the

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[7] Section 310 provides in pertinent part:

> Any party conceiving himself aggrieved may appeal by petition to the commissioner of education who is hereby authorized and required to examine and decide the same; and the commissioner of education may also institute such proceedings as are authorized under this article.

N.Y. Educ. L. § 310 (McKinney 1988).

building or purchase of new school facilities by local districts advanced the goal of school desegregation, rather than hindered it. Section 408 provides that before any school building may be constructed or purchased, the plans and specifications for it must be submitted to and approved by the Commissioner. N.Y. Educ. L. § 408(1) (McKinney Supp. 1995). The Commissioner is not to grant such approval, however, unless the plans submitted reflect "reasonable consideration" of the manner in which the proposed school fits into "a comprehensive, long-term school building program." *Id.* § 408(3) (McKinney 1988). No reason was offered by the State defendants as to why the Commissioner could not have taken the position that new school proposals that did not further desegregation did not fit well into "a comprehensive, long-term school building program,. and should therefore not be approved.

Finally, as a fifth option, the Commissioner and his staff could have adopted the time-honored strategy of using the carrot rather then the stick: they could have recommended to the legislature that funding proposals for the benefit of local school districts be made contingent upon the adoption of desegregation programs.[8]

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[8] It is important to note that these supervisory and enforcement options are not recognized as such merely as a matter of hindsight, but rather were available to the State at the time of the events in question in this litigation. For example, in the early 1970's, when the SED was considering a plan of proactive intervention in districts exhibiting a high degree of racial imbalance, one SED official had this to say about the Commissioner's § 310 powers:

> Strictly speaking the Department [*i.e.*, the SED] has not *initiated* action in individual school districts. Formal Department action of the kind that results in a Commissioner's order to a district to develop a plan for correcting racial imbalance has always come as a result of an appeal to the Commissioner by citizens of a school district. . . . It is true that Section 310 does provide for the Commissioner himself instituting hearings in which a district would be required to show cause why it does not correct racial imbalance. The use of this provision of the Law is, of course, a possibility: whether or not it will be used has not been decided at this point.

YBE Exh. 16-44 at 5 (emphasis in original); *see also* YBE Exhs. 16-50 at 4; 16-62 at 4. One of the racial integration policy statements issued by

The State's position, as we understand it, is that while State educational officials may *nominally* have had the power to force local school districts to desegregate, they were for all practical purposes precluded from using that power. It was suggested at trial, for instance, that withholding general state financial aid under § 306 was an indiscriminate approach to a discrete problem which would have harmed the very children the desegregation policies were meant to help. Tr. 1428-31 (Ambach); Tr. 2194-95, 2197-99 (Stone). It was argued that the Commissioner was in a poor position to initiate proceedings *sue sponte* under § 310 (as opposed to ordering a proceeding in response to a private citizen's complaint) because (1) there did not exist a publicly announced set of criteria and standards as to exactly what constituted unacceptable racial segregation in the schools; the Commissioner would consequently have no prescriptive basis on which to issue a § 310 order; and (2) there did not exist a record of the particular case as prepared by private parties; the Commissioner would consequently have no factual basis on which to issue a § 310 order. YBE Exh. 14-34; Tr. 2206-07, 2238, 2261 (Stone). It was argued that the State could not develop and apply a uniform set of regulations in the desegregation context because the physical and demographic uniqueness of each school district compelled a tailor-made approach. Tr. 1392-93 (Ambach); Tr. 2207 (Stone). Finally, it was suggested that the State undertook careful monitoring and enforcement actions

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the Regents endorsed the idea of State initiative in desegregation matters by putting squarely on the State the responsibility of stepping in and imposing remedial measures in the event that local officials failed to act. *See* YBE Exh. 3-7, "Integration and the Schools: A Statement of Policy and Recommendations by the Regents of the University of the State of New York," at 12 ("Where the solution to the problem [of racial integration in the schools] is beyond the capability of the local school districts, or where a district fails or refuses to act, then the responsibility for corrective action is clearly and inescapably that of the State."). And, when Gordon Ambach began his tenure as Commissioner of Education in 1977, he told the SED staff that, with regard to racial integration, "[w]here local district action lags or is outside legal obligation, our responsibility is to assure [that] the rights of all persons are protected fully." YBE Exh. 14-44 at 7.

only when the State was administering the expenditure of federal funds. *See* Tr. 1057-60 (Batista).

We reject this entire line of argument. None of these alleged obstacles to State enforcement action is more than rationalization to justify inaction. The withholding of general state financial aid from disobedient school districts was perhaps too strong a deterrent, but the State had threatened at least one school district with it in the past—ironically, Yonkers—and with considerable success.[9] Had the Commissioner chosen to proceed *sua sponte* under § 310, he would have labored under no disadvantage or difficulty that he did not already face in the § 310 proceedings he routinely brought at the request of private citizens. The measure of acceptable levels of integration would have been exactly what it was in the non-*sua sponte* cases, that is, the Regents' racial integration policy statements, Tr. 2236, 2238-39 (Stone); and, guided by the statistics annually collected by the SED, the Commissioner would have had all the information he needed to determine whether a given school district exhibited an unacceptable degree of racial imbalance. See *supra* note 4.[10]

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[9] In the mid-1950's, a number of Yonkers citizens complained to State education officials that the Yonkers schools were being neglected and inadequately funded. After considering the citizens' appeal, then-Commissioner Wilson concluded that:

> [i]t is quite evident that as Commissioner of Education I am not justified in apportioning public moneys to any community if it fails to carry out its own obligations in the way of providing instructional services for its children. The situation at Yonkers will need to be resolved to the extent that I am satisfied that it is proper for me to continue to apportion public moneys to such district. . . . The [Yonkers] Board of Education will be required to submit to me before January first next sufficient evidence of an adequate program, both in respect to its education offerings and its building needs for the ensuing year, which would justify me in making an apportionment for such year.

YBE Exh. 2-3 at 1. When Yonkers showed an intention to comply with the State's recommendations for improving its school system, the State withdrew its threat to cut off state aid. *Id.* at 4.

[10] In citizen-instigated and *sua sponte* § 310 proceedings relating to desegregation, the burden is simply to establish the existence of racial

As for the feasibility of general regulations in the desegregation context, it was conceded at trial that State regulations oftentimes require schools districts to prepare plans for dealing with educational conditions that vary from district to district. Tr. 1506-07 (Ambach); *see also* Tr. 2250 (Stone). There is no reason to believe that the State could not have issued regulations requiring each school district, including Yonkers, to submit a plan detailing the racial makeup of its school population and outlining the steps it planned to take to remedy any unacceptable imbalance. Indeed, in 1963, then-Commissioner Allen effectively did just this, albeit in the form of a letter rather than a regulation. YBE Exh. 4-15. Finally, the record shows that the State has not hesitated to intervene in local school districts in instances where only state money is involved. *See* Tr. 1626 (Raymond) (state intervention in the area of physical education); Tr. 1768 (Cox-Gerlock) (state intervention in the area of guidance). The record does not support the State's claim that intervention occurred only when the State was monitoring the expenditure of federal funds.

By all accounts, the SED is one of the most activist state educational bodies in the country. See, *e.g.*, Tr. 1773 (Cox-Gerlock). It vigorously monitors and regulates many different aspects of education, including special education, bilingual education, vocational training, achievement scores, dropout prevention, and school building construction. Contrary to the defendants' characterization, the SED has not subscribed to what one might call a "laissez-faire" approach to educational oversight. When, for example, a fatal football accident occurred in Yonkers, the State's interest, involvement, and presence were prompt and keenly felt. Tr. 1618-24 (Raymond). To argue, then, that when it came to enforcing its own school desegregation policy, the State somehow came up short in supervisory authority, is singularly unpersuasive.

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imbalance in the challenged school district, not to establish the cause of the imbalance. Tr. 2239 (Stone). The statistical data the SED routinely collected would therefore have provided the Commissioner with an adequate factual basis on which to proceed.

The Court finds that the State had several effective means for compelling local compliance with its racial integration policy during the years at issue in this litigation. If the State did not in fact force compliance, it certainly was not because it lacked the authority or practical power to do so.

3. *What the State Did (or Did Not Do)*

From the moment in the late 1960's that the State became aware that conditions of racial imbalance were developing in the Yonkers schools, it was in a position to require Yonkers to undertake remedial measures. It never took advantage of that position. The State never threatened to withhold state financial aid from Yonkers or to remove those Yonkers school officials who opposed efforts to integrate the Yonkers schools; it never initiated *sua sponte* a § 310 proceeding designed to investigate and remedy the segregative conditions in the Yonkers schools; it never wrote regulations addressing the issue of school desegregation; it never directed Yonkers officials to consider the segregative impact of new school construction or acquisition before approving their submitted plans and specifications; and, it let pass opportunities to condition state aid to the schools on local desegregation efforts, *see, e.g.*, YBE Exh. 14-7; Tr. 1528-32 (Ambach). The State did not, in short, require anything of Yonkers in the area of school desegregation. The one instance in which State education officials seemed prepared to intervene affirmatively in Yonkers and organize and/or compel desegregation efforts was in 1971-72, when Commissioner Nyquist put his staff to work on a "master plan" for desegregating the most racially imbalanced school districts. *See* YBE Exhs. 16-46(A),(B),(D),(E); 16-50; 16-62. The master plan never materialized, however; it was shelved for lack of State funding. Tr. 178-79 (Sheldon).

Rather than act, the State waited. It waited for private citizens in Yonkers to invoke the State's help by filing § 310 petitions, *see* Ramsey Dep. at 89; Tr. 1451-55 (Ambach), but no petition was ever filed. It waited for Yonkers to make voluntary efforts to desegregate its schools, and asserts that it

stood ready with offers of money and technical assistance to aid such efforts. Ramsey Dep. at 90-91, 93-94; Tr. 1454 (Ambach). But it never forced the issue. When, for example, the Yonkers education community appeared ready in 1970-71 to take steps to end the segregation in the schools, YBE Exh. 17-17, the SED dispatched staff member Morton Sobel to talk to the local PTA groups. Sobel's message was relatively soft: Yonkers is a segregated district: segregation is not good for children; it is up to you to do something about the condition in your schools. Sobel Dep. at 187-88; Tr. 404-05 (Siragusa). When Yonkers did nothing about the condition in its schools, the State dropped the issue. *See* Sobel Dep. at 191-93; Tr. 190 (Sheldon).

In the fall of 1975, when the Yonkers education community again showed an inclination to undertake reforms, the State reappeared on the scene. This time, however, it could not even deliver on its promise to provide meaningful financial aid for the local reform effort. YBE Exhs. 17-79; 17-81; Tr. 348 (Ross); Tr. 1155-56 (Jacobson). And, when this second effort ultimately fizzled out in 1977-78, in no small part due to the State's failure to contribute funds, the State once again said and did nothing. *See* Ramsey Dep. at 92-94; Tr. 1448-52 (Ambach).

Not even when the federal government intervened in Yonkers in 1980, alleging violations of the federal civil rights laws, did the State seek to hold Yonkers accountable for its long-standing violation of the State's school desegregation policy. Tr. 1634 (Raymond). The most the State did was to offer to procure federal funding for Yonkers to help pay the cost of complying with the federal desegregation order, and to provide technical assistance in the development of a desegregation plan. Defendants' Exh. XX; YBE Exh. 17-131; Ramsey Dep. at 82-83. When the YBE ultimately decided to fight the federal order, the State withdrew these offers of aid, YBE Exh. 17-134, and was not heard from in the matter again. The State even let pass an opportunity to cajole Yonkers into complying with the federal desegregation order when, in 1984, it refused to condition its financial bailout of Yonkers on the

City's ratification of a consent decree with the federal government. *See* YBE Exh. 17-156; Tr. 1632-33 (Raymond).

In sum, with all of its authority and knowledge of the segregative conditions in the Yonkers schools, the State essentially adopted a wait-and-see attitude. It asserted a willingness to help Yonkers help itself, but it would not force Yonkers to change. Thus it occurred that in Yonkers, where local support for desegregation was minimal and no citizen-initiated § 310 proceeding was ever commenced, desegregation simply did not take place until it was compelled by order of the federal court.

At this point, it is important to make clear what factual findings the record *does not* support. There is no evidence that State education officials ever undertook affirmative actions to preserve segregation in the Yonkers schools, or that they indicated to anyone in Yonkers, either tacitly or otherwise, that they thought that segregation in the schools should be preserved. There is no evidence that State education officials ever actively impeded Yonkers officials from taking steps on their own to remedy the school segregation. There is no evidence that State education officials ever communicated to anyone in Yonkers that they would purposefully "look the other way" should Yonkers decide to continue to be in violation of State desegregation policy. There is no evidence that State education officials ever adopted a policy that indicated specific approval of the manner in which Yonkers was managing the racial makeup of its schools. Finally, there is no evidence that, had a Yonkers citizen filed a desegregation § 310 petition, the State would not have responded to that petition promptly and fairly. Indeed, the record supports the finding that the Commissioners of Education in most instances enforced the racial integration policy in connection with proceedings brought before them by private citizens under § 310.[11]

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[11] The State made serious efforts to inform the Yonkers public as to how a private citizen or citizens' organization could trigger a State investigation under § 310. *See, e.g.*, YBE Exh. 17-49 at 1.

4. *Why the State Did Not Intervene in Yonkers*

The State exhibited a determined reluctance to enforce its own desegregation policy in Yonkers, and a significant portion of the trial was devoted to an inquiry into why that was so. The Court accepts in large part the plaintiffs' explanation, which is that race-based political opposition to integration throughout New York State eventually exerted enough pressure on the Regents and on SED officials as to cause them to become cautious and reactive on the issue of desegregation.

During the 1960's and early 1970's, State education officials actively set about to bring an end to the racial imbalance that existed in the New York public schools. The Regents strongly endorsed school desegregation in the racial integration policy statements of 1960, 1963, 1968 and 1972. YBE Exhs. 3-1; 3-2; 3-7; 3-12. The SED, under Commissioner Nyquist, did not hesitate to enforce the racial integration policy in connection with § 310 appeals from private citizens. In each of these proceedings, Commissioner Nyquist found that *de facto* segregation existed and sought to institute remedial measures. Moreover, the SED under Nyquist took steps to formulate a comprehensive plan of affirmative state intervention in school districts that exhibited a high degree of *de facto* segregation. YBE Exhs. 16-46(A),(B),(D),(E). The activist tenor of the SED's position during these years is perhaps best captured in a report on State integration initiatives written by an SED staff member in 1972. Concerning the Albany school district, the staff member wrote, "[n]o citizen has ever appealed for the correction of racial imbalance, but Albany should not for that reason be neglected." YBE Exh. 16-50 at 4.

By 1969, however, opposition to non-voluntary means to achieve racial integration in the schools—and to racial integration itself—had swelled to the point where the New York State Legislature enacted Chapter 342, a law that prohibited State education officials, as well as local school districts with appointed school boards, from assigning students for the purpose of achieving racial balance or of taking other desegregative actions. Although the statute was ultimately declared

unconstitutional, as violative of the Equal Protection Clause, *see Lee v. Nyquist*, 318 F.Supp. 710 (W.D.N.Y. 1970) (three judge court), *aff'd*, 402 U.S. 935 (1971), the attitude of the State Legislature was clear. Indeed, even after Chapter 342 was struck down, the Legislature continued to debate and pass bills and resolutions that were similar to Chapter 342 in their purpose and intended effect. *See, e.g.*, YBE Exhs. 7-21(A)-(E); 7-22; 7-28; 7-37.

Following the invalidation of Chapter 342, the State took measures that had the cumulative effect of undermining efforts to reduce school segregation. In 1971, the Legislature eliminated the Racial Balance Fund, which was the source of funding to assist communities in undertaking the expensive task of desegregating their schools, and refused each year thereafter to reinstate the Fund despite annual requests to do so from State education officials. The elimination of the Fund deprived State officials of one of the few positive inducements they had to encourage local acts of desegregation, and thereby weakened their efforts to implement the Regents' racial integration policy. YBE Exh. 16-62 at 2; Campbell Dep. at 43-45; Tr. 90-91 (Sheldon).

Changes were also taking place in the composition of the Board of Regents due to the accession to the Board of new Regents, interviewed prior to appointment by legislators (a new practice), who were known to be hostile to vigorous desegregation efforts.[12] In February, 1974, a law was passed that shortened the Regents' term of office from fifteen to seven years in order to make them more "accountable" to elected officials and their constituents. YBE Exh. 10-13; Tr. 2545 (Griffith). In the summer of the same year, the Regents, prodded by criticism of Commissioner Nyquist's vigorous desegregation efforts, *see, e.g.*, YBE Exh. 10-15, undertook a reexamination of their 1972 racial integration policy state-

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[12] In 1976, one New York State Senator refused to vote for a bill that was similar to Chapter 342 on the grounds that he had already taken the steps needed to stop forced busing by voting for the election of three new regents, "everyone of whom" was opposed to Commissioner Nyquist's § 310 efforts. YBE Exh. 7-37 at 79 (remarks of Senator Halperin).

ment. That reexamination resulted in revised policy statements that diluted the pro-desegregation force of the 1972 statement.[13] In at least two instances, individual Regents interceded in Commissioner Nyquist's § 310 proceedings to plead the case for less drastic desegregation orders. *See* YBE Exhs. 12-20; 12-21; Defendants' Exhs. 6H; 6I. And the Regents as a whole, out of a concern to rein in Nyquist's desegregation efforts, *see* YBE Exh. 12-25 at 1; Defendants' Exh. 6K at 1, 3, lobbied for legislation providing for stricter judicial review of the Commissioner's § 310 orders. YBE Exh. 12-71. That legislation became law in 1976.

Finally, in November, 1976, the Regents fired Commissioner Nyquist. The YBE and NAACP sought to prove at trial that he was fired because of his vigorous stance on integration, while the State argued that relations between Nyquist and the Regents had so deteriorated that his continued service was unacceptable. Indeed, there is ample evidence that Nyquist's dealings with some Regents was high-handed and offensive and that, to a considerable extent, he precipitated his own removal. In all, we find that the plaintiffs have not proven that Nyquist would not have been fired but for his views on integration. We do find, however, that his views on this subject were a substantial factor leading to his discharge.

In the years following Nyquist's removal, the furor over desegregation died down to a considerable extent. And with good reason: Nyquist's successor, Gordon Ambach, was not presented with any § 310 appeals from private citizens; and, in accordance with the practice of his predecessors, he did not initiate any § 310 proceedings *sua sponte*. Tr. 1412 (Ambach). With respect to the § 310 appeals he inherited from Commissioner Nyquist, there is evidence to suggest that Commissioner Ambach eventually issued orders that were less stringent, from a remedial standpoint, than the orders initially

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[13] The revised statements emphasized that desegregation efforts, such as the use of forced busing, should not be allowed to jeopardize the health and safety of children, *see* YBE Exh. 11-17, and that the use of quantitative measures (*i.e.*, quotas) was not the sole or even principal means for detecting and correcting school segregation. YBE Exhs. 3-14; 17-44.

fashioned by Commissioner Nyquist. *See* Defendants' Exhs. C-27 & C-28 (Ambach extended by one year the time that the Rockville Centre school district had to begin integrating its elementary schools; Nyquist had previously denied an extension); C-46 & C-47 (Ambach allowed Syracuse to delay the integration of three elementary schools).

There is little doubt in the Court's view that the State's gradual retrenchment from its once strong school desegregation policy, as just outlined, was motivated by a growing antipathy to desegregation on the part of the New York State Legislature. To be sure, the debate that was being conducted during these years was cast in terms of being for or against busing. The evidence is clear, however, that "busing" was a symbol for integration. Busing, after all, was common in many areas of the State for reasons having nothing to do with matters of race (*e.g.*, for the purpose of school centralization programs). While there were those who raised good-faith questions as to the conditions under which busing should take place, the furor over busing *per se* cannot be explained on any non-racial grounds.

What is more, this growing antipathy to desegregation did not go unnoticed by the SED officials charged with promoting school desegregation. There was testimony, which the Court finds credible, that these SED officials regarded the Regents' revisions of the 1972 policy statement, their support of stricter review of the Commissioner's § 310 orders, and their firing of Commissioner Nyquist as part of an effort to retreat from the commitment to school desegregation. Campbell Dep. at 48-49, 101-02; Tr. 147-48, 212 (Sheldon); Tr. 884-86, 916-17 (Keyes). There was testimony that SED officials perceived the Legislature to be making appointments of Regents with the racial integration policy in mind. Tr. 108-09 (Sheldon). And, perhaps most importantly, there was testimony that these impressions on the part of SED officials had the effect of making them slow down and proceed more cautiously in their desegregation efforts. *See, e.g.*, Tr. 916-19 (Keyes).[14]

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[14] There is no evidence that the Legislature or the Regents ever made any efforts to communicate to SED officials that, despite appear-

To sum up: the State had the power to act in support of school desegregation in Yonkers, but it lost the will to act. And it lost the will to act for the simple reason that its once touted principles of racial equality in the schools had become politically untenable.

5. *The Effect on Yonkers of the State's Failure to Intervene*

The State's failure to intervene in Yonkers impacted the City in several ways. The most obvious impact, of course, is that Yonkers was not forced to desegregate its schools. There is every reason to believe that had the State brought its coercive powers to bear in Yonkers, Yonkers would have complied with its directions. *See* Deposition of Gerald L. Freeborne, Dated October 30, 1990, at 103;[15] Tr. 1625-28 (Raymond); Tr. 2249 (Stone); Tr. 2784 (Genrich).

The second impact on Yonkers was more subtle, but equally real. There is evidence that when the State failed to intervene in Yonkers, either coercively or by way of positive inducements, it altered the balance of power between the forces in Yonkers favoring reform and the forces in Yonkers opposing reform. For example, the response to SED official Morton Sobel's rather tepid call to action in 1971 (recounted *supra* p. 21) was a "mixed bag":

> There were people that were delighted that they didn't have to deal with the issue [of desegregation], that it seemed as though it wasn't imperative. There were others that were very disappointed such as I was that we

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ances to the contrary, they continued to support vigorous desegregation efforts.

15 "Q. : With respect to the state requirements[,] if a school district wasn't in compliance with state requirements, did that lead to some direct action by the state to bring them into compliance or was there some recognition, well, we have these requirements, not everyone has to follow them?"

"A.: Where a problem was identified, they would be told to correct the situation, and I can't think of an instance where it was not corrected once the problem was identified."

> didn't get more specific information from him regarding help. Both ends.

Tr. 405 (Siragusa).

In October, 1975, the YBE authorized the formation of a task force to develop a plan for desegregating the Yonkers schools. The task force urgently requested financial aid from the SED, YBE Exhs. 17-54; 17-68; 17-71, and the SED quickly promised roughly $80,000 in funding. However, the SED was unable to furnish any money until May, 1976, and then only $13,000. YBE Exhs. 17-56 at 2; 17-81; Tr. 303-05, 307, 344 (Ross). This lack of funding hindered the efforts of the task force, Tr. 1138 (Jacobson), and delayed the presentation of its recommendations to the YBE. And this delay, in turn, enabled opposition to the reform efforts to coalesce to a point where the YBE became hostile to the very desegregation initiative it had originally commissioned. Tr. 313-14, 321-22 (Ross); Tr. 439-41 (Siragusa).

Finally, in 1978, when the Yonkers community was considering the desegregation plan of then-Superintendent Joseph Robitaille, an influential Yonkers taxpayers association that opposed the plan had the following to say about the possibility of State intervention should the plan be rejected:

> The State Department of Education is the other governmental agency able, by means of funding, to force an integration plan on the school board. This agency, however, after going through a period marked by particularly zealous integration directives, is modifying its approach. Last spring, the former commissioner of education Ewald Nyquist, was dismissed because of his single-minded pursuit of desegregation throughout the state by busing and other means whether or not warranted. It is now obvious that the Board of Regents is taking a more cautious view of integration cases and directives. . . . It is clear that busing for integration purposes is out of favor even at the state level, and that there is very little likelihood that the commissioner [Ambach] would

> mandate a forced busing program on the city of Yonkers.
>
> . . .
>
> [We] therefore again recommend[ ] that the Board of Education reject [Superintendent Robitaille's plan] without being intimidate[d] by fear of federal or state agency sanctions.

YBE Exh. 17-113 at 4.

As is evident from this passage, there was a public perception in Yonkers that Commissioner Nyquist's termination came as a result of his pro-integration stance. This perception added to the widespread belief that the State would not aggressively address the problems in the Yonkers schools or elsewhere in New York. And, whether accurate or not, this belief bolstered those in Yonkers who hoped that the State would in fact leave Yonkers alone.[16]

B. *Housing*

The New York State Urban Development Corporation ("UDC"), established by the New York State Legislature in April 1968, was perhaps the most powerful state housing and development agency ever created. Tr. 1249-51 (Danielson). Combining functions, such as housing finance and project development, that were formerly performed by separate entities, the UDC was also given the unprecedented authority to override local building and land use controls and to exercise powers of eminent domain. YBE Exh. 6-9 at § 16; Tr. 754 (Hayden); Tr. 1252 (Danielson).

Headed by president and chief executive officer Edward Logue, the UDC was run by a staff of enthusiastic and idealistic persons dedicated to the creation of fair housing. Depo-

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[16] As was the case with SED officials who entertained a similar belief, the State made no serious effort (such as by a statement from the Board of Regents itself) to dispel the notion that the State had ceased to be committed to school desegregation. *See, e.g.*, Tr. 2383-87 (Kendall); 2609-11 (Griffith). The Regents can be charged with knowledge of the public's impression of State retrenchment on desegregation matters because of the news clippings from around the State which they regularly received and reviewed. *See* Tr. 2384 (Kendall); Tr. 2553-54 (Griffith).

sition of Edward J. Logue, Dated December 13, 1991 ("Logue Dep."), at 26, 29, 52, 153; Tr. 753-54 (Hayden). There is and can be no serious allegation that the UDC staff had a malicious desire to further racial discrimination in Yonkers or elsewhere.

UDC was initially invited by local officials to become active in Yonkers when that City was faced with the threat by Otis Elevator Company, a major employer and economic presence in Yonkers, that it would move away from Yonkers unless it could expand its existing plant. Otis plant expansion required the relocation of significant numbers of persons, primarily minority members, for whom housing accommodations within Yonkers had to be created. *See Yonkers Board*, 624 F.Supp. at 1317; Logue Dep. at 79; Tr. 735 (Hayden).[17]

The UDC embarked on this task with enthusiasm, initially pushing for "scattered site" housing throughout the City of Yonkers.[18] Logue Dep. at 135; Tr. 760 (Hayden); Tr. 815 (Morris); Tr. 1163 (Galgano). For example, a list of possible sites referred by the UDC to City officials in June, 1969 contained eleven locations in different parts of the City. *See Yonkers Board*, 624 F.Supp. at 1317; YBE Exh. 19-36; Tr. 562 (Pistone). However, the UDC was soon made aware of strong local opposition to the building of subsidized housing in the predominantly white areas outside of Southwest Yonkers. *See Yonkers Board*, 624 F.Supp. at 1317-18. The UDC clearly had at least some knowledge that this opposition was race-based. Tr. 539 (Pistone); Tr. 694 (Gibson); Tr. 753, 762 (Hayden); Tr. 853 (Morris); Tr. 1281-82 (Danielson).

We find that the UDC, confronted with this race-based community opposition and concerned about the political feasibility of scattered-site housing, made a determination not to exercise its statutory override powers, which would have

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17 Ultimately, Otis Elevator rejected proposals to stay in Yonkers and opted to move out. *See* 624 F.Supp. at 1319.

18 "Scattered site" housing refers to housing that is geographically distributed in different neighborhoods, as opposed to housing concentrated in low-income, heavily minority areas. *See, e.g.*, Deposition of Gerald Lenaz, Dated May 18, 1983 ("Lenaz Dep."), at 97.

enabled it to proceed without local approval.[19] Tr. 696 (Gibson); Tr. 762 (Hayden); Tr. 1281-83, 1288-89 (Danielson). Between 1969 and 1975, the UDC sponsored 1,200 of the 2,600 units of subsidized housing for families approved and opened in Yonkers. *See Yonkers Board*, 624 F.Supp. at 1313.[20] These units, as well as those in two senior citizens projects built during the same period, were concentrated in the Southwest region of the City. *Id.* This Court has previously found that the concentration of new housing in Southwest Yonkers worsened the already segregated state of housing and schools in the City. *Id.* at 1364, 1500.

During and after 1973, various factors threatened the financial stability of the UDC and increasingly curtailed its housing program. YBE Exh. 6-62. The precipitating event was the federal government's moratorium on all new federal housing subsidy commitments under section 236 of the National Housing Act, upon which the UDC had become highly dependent. Defendants' Exh. ZZZ; YBE Exh. 6-48 at 8; Logue Dep. at 63-64, 75, 178; Tr. 1271 (Danielson). This and other factors eventually led the UDC and its housing program into default. YBE Exh. 6-66 at 3. In 1975, the State bailed out the UDC and effectively ended its housing program. YBE Exh. 6-66; YBE Exh. 20-63 at ¶ 10; Tr. 1690-92 (Danielson).

The UDC advances several explanations for its determination not to exercise its statutory override powers in order to achieve "scattered site" housing. First, UDC representatives testified that one of their chief priorities was to build good housing promptly. Tr. 735-36 (Hayden). Their hope was that

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[19] In addition to using its override powers to achieve scattered-site housing despite community opposition, the UDC could have used the threat of such an action as leverage in negotiating with local public officials to achieve the same result. *See* Tr. 1253 (Danielson) (describing the override power as "a bargaining instrument of very substantial potential."). However, there is little evidence that the UDC attempted even this lesser course of action.

[20] The UDC approved these units pursuant to a Memorandum of Understanding entered into with the City in July, 1970 and amended in 1971 and 1972. YBE Exhs. 19-81; 19-113; 19-174.

once the community witnessed the high quality of this initial housing, it would more readily accept additional housing. Tr. 695, 709, 720-21 (Gibson); Tr. 782-83 (Hayden). Second, the UDC maintains that the construction in fact undertaken was the most integrative subsidized housing ever built in Yonkers and was intended to be marketed pursuant to a plan that would have resulted in an integrated tenancy. YBE Exhs. 20-9 to 20-12; Logue Dep. at 137, 142-44; Examination Before Trial of Marion Scott at 60-63, 168-69; Tr. 762, 799-800 (Hayden). Finally, witnesses testified that the construction in Southwest Yonkers was but the first phase of the UDC's intended activities in the City. Had the UDC's housing program not come to an abrupt and unforeseen halt, the UDC would have pursued its long term plans for scattered-site housing. Lenaz Dep. at 242, 275; Tr. 717-18 (Gibson); Tr. 781-82 (Hayden).

We accept as true the UDC's explanations for its actions. Nevertheless, we find that between 1969 and 1975 the UDC, regardless of its long-term plans or good intentions, knowingly acquiesced and indeed participated in the segregative site selections for which this Court has already found the City of Yonkers to be liable. *Yonkers Board*, 624 F.Supp. at 1376.

III.

CONCLUSIONS OF LAW

A. *Schools*

1. *Sovereign Immunity*

As a threshold matter, the State has raised a number of issues relating to sovereign immunity which go directly to the Court's subject matter jurisdiction over the State defendants. As will be recalled from prior opinions in this impleader action, the plaintiffs allege that the State defendants have engaged in a continuing pattern of conduct contributing to segregation in the Yonkers schools in violation of, *inter alia*, the Fourteenth Amendment to the Constitution, Title VI of

the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.* (1988) ("Title VI"), and other civil rights statutes, 42 U.S.C. §§ 1981, 1983, 1985, and 1988 (1988). The State argues that none of these legal provisions furnishes a basis for overcoming the sovereign immunity of the State of New York, its officials, and its agencies under the Eleventh Amendment.

The State's claim for the most part fails. Apart from State defendant Mario Cuomo, *see infra* pp. 37-40, there exists no jurisdictional bar to suit against the individual State defendants (*i.e.*, the individual Members of the Board of Regents and the Commissioner of Education) and the Director of the UDC, all sued in their official capacities. It is by now well-established that the Eleventh Amendment does not bar suit in federal court against a state official for prospective injunctive relief to remedy a continuing wrong. *See, e.g., Milliken v. Bradley*, 433 U.S. 267, 289 (1977); *Ex parte Young*, 209 U.S. 123 (1908). In the context of school segregation cases such as this one, a "continuing wrong" exists as long as state officials fail or refuse to eliminate from the public schools all vestiges of segregation for which they are either partly or wholly responsible. *See, e.g., United States v. Fordice*, 112 S.Ct. 2727, 2735, 2737 (1992); *Columbus Board of Educ. v. Penick*, 443 U.S. 449, 459 (1979); *Milliken*, 433 U.S. at 289-90. Accordingly, should the Court conclude that the conduct of the individual State defendants prior to 1985 contributed to school segregation in Yonkers, and that these defendants have failed to remedy the segregation since 1985, the Eleventh Amendment would not bar an order requiring them to share the costs of eliminating those vestiges of segregation that continue to exist. And, once the Eleventh Amendment bar were removed, 42 U.S.C. § 1983 could clearly serve as an affirmative basis of legal liability. *See Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 n.10 (1989).[21]

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[21] Of course a state official in his or her official capacity, when sued for injunctive relief, would be a person under § 1983 because 'official-capacity actions for prospective relief are not treated as actions against the State.' " (quoting *Kentucky v. Graham*, 473 U.S. 159, 167 n.14 (1985)).

As regards Mario Cuomo, sued here in his official capacity as (ex-) Governor of the State of New York, the Court agrees with the State that he should be dismissed as a defendant because there does not exist a sufficient connection between him and the alleged wrongdoing. *See* State and UDC Defendants' Post-Trial Brief on Liability ("State Post-Trial Brief") at 12-17. As the Supreme Court explained in *Ex parte Young*, 209 U.S. at 157:

> In making an officer of the state a party defendant in a suit to enjoin the enforcement of an act alleged to be unconstitutional, it is plain that such officer must have some connection with the enforcement of the act, or else it is merely making him a party as a representative of the state, and thereby attempting to make the state a party.

In *Gras v. Stevens*, 415 F.Supp. 1148, 1152 (S.D.N.Y. 1976) (three-judge court) (Friendly, J.), the court applied this language to dismiss a § 1983 lawsuit against then-Governor Rockefeller on the grounds that the Governor's general duty to enforce state laws, *see* N.Y. Const. art. IV, § 3 (McKinney 1987), did not, without more, establish the necessary connection between him and the statute alleged to be unconstitutional. *See also Los Angeles Branch NAACP v. Los Angeles Unified School Dist.*, 714 F.2d 946, 953 (9th Cir. 1983) (dismissing § 1983 school desegregation action against the Governor of California), *cert. denied*, 467 U.S. 1209 (1984).

In the present case, the connection between Governor Cuomo and the alleged unconstitutional conduct of the State is too thin to conclude that he, independently of the State of New York, is a real party in interest. As the State points out, it is the Commissioner of Education's duty, not the Governor's, to enforce "all general and special laws relating to the educational system of the state . . . ." N.Y. Educ. L. § 305(1) (McKinney 1988). The Governor has no role in the appointment of state education officials, *see* N.Y. Const. art. V, § 4 (McKinney 1987); N.Y. Educ. L. §§ 202(1) (McKinney Supp. 1995), 302 (McKinney 1988); nor does he make general policy recommendations for elementary and secondary school education. Rather, the Board of Regents has the responsibil-

ity of determining State educational policy, N.Y. Educ. L. § 207 (McKinney 1988), and the Commissioner has the responsibility of executing it. *Id.* § 305(1). Given this institutional structure, which distances the Governor of New York from involvement in educational affairs, it is perhaps not surprising that none of the factual allegations listed in plaintiffs' second amended complaint and amended answer directly implicates Governor Cuomo. Perhaps most importantly, plaintiffs have not indicated how the present Governor of New York would have the legal responsibility for implementing an order by this Court to eliminate the vestiges of past segregative acts by the State. *Cf. Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 101 (1984) (" 'The general rule is that relief sought nominally against an officer is in fact against the sovereign if the decree would operate against the latter' " (quoting *Hawaii v. Gordon*, 373 U.S. 57, 58 (1963) (per curiam)).[22]

In light of the foregoing, the Court concludes that it lacks subject-matter jurisdiction over this action as it relates to Governor Cuomo. He is, accordingly, dismissed as a defendant in this action.

The final sovereign immunity issue concerns whether the Eleventh Amendment bars suit against defendants State of New York, the SED, and the State Board of Regents.[23] The general rule, of course, is that the Eleventh Amendment is an

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[22] The plaintiffs did introduce at trial evidence indicating that Governor Cuomo played a role in the State's decision in 1984 not to condition its financial bailout of Yonkers on the City's acceptance of a consent decree with the federal government. *See supra* p. 22. We do not think, however, that the Governor is amenable to an order to provide prospective relief to the Yonkers schools simply because he may have purposely decided to forego a one-time instance of political leverage over Yonkers. This instance appears to have been an anomaly, in the sense that it brought a State official who normally had no direct involvement in educational matters into *ad hoc* contact with an educational problem.

[23] The Second Circuit Court of Appeals has already decided that the UDC may not successfully assert the Eleventh Amendment as a defense to this action. *United States v. Yonkers*, No. 92-6198, slip op. at 3 (2d Cir. Jan. 13, 1993).

absolute bar to suits brought in federal court against states and their agencies without either the state's express or implied consent or an express abrogation by Congress of the state's Eleventh Amendment immunity. *See, e.g., Pennhurst*, 465 U.S. at 99-101.[24] The record before the Court does not include any consent, either express or implied, by the State of New York to permit this suit to proceed in federal court against itself or its agencies. The question remains whether Congress by statute has expressly abrogated the State's Eleventh Amendment immunity. (We say "by statute" because the Fourteenth Amendment, by its own force, does not override a state's Eleventh Amendment immunity. *See Santiago v. New York Dep't of Correctional Servs.*, 945 F.2d 25 (2d Cir. 1991), *cert. denied*, 502 U.S. 1094 (1992)).

The first point to be made is that, by enacting 42 U.S.C. §§ 1981, 1983, and 1985, Congress did not abrogate the state's Eleventh Amendment immunity. *Quern v. Jordan*, 440 U.S. 332 (1979) (Eleventh Amendment immunity not abrogated by § 1983); *Rucker v. Higher Educ. Aid Bd.*, 669 F.2d 1179, 1184 (7th Cir. 1982) (§§ 1981, 1985); *Davis v. Buffalo Psychiatric Center*, 623 F.Supp. 19, 20 (W.D.N.Y. 1985) (§ 1981).

However, plaintiffs may proceed against the State and its agencies under Title VI. That statute provides, in pertinent part, that:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to

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[24] Whether the New York State Board of Regents can be classified as a State "agency" for Eleventh Amendment purposes appears to be a question of first impression in this Circuit. However, given that the Second Circuit has ruled that the State University of New York is itself an integral part of the government of the New York and partakes of the State's sovereign immunity, *see Dube v. State University of New York*, 900 F.2d 587, 594-95 (2d Cir. 1990), *cert. denied*, 501 U.S. 1211 (1991), we conclude that the University's governing body—the Board of Regents—enjoys sovereign immunity as well.

> discrimination under any program or activity receiving Federal financial assistance.

42 U.S.C. § 2000d. Title 42 U.S.C. § 2000d-7 then provides:

> (a) General provision
>
> (1) A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of . . . title VI of the Civil Rights Act of 1964 . . . .
>
> . . .
>
> (b) Effective date
>
> The provisions of subsection (a) of this section shall take effect with respect to violations that occur in whole or in part after October 21, 1986.

The State makes two main arguments with respect to the sovereign immunity implications of Title VI in this case. It first contends that because Title VI prohibits discrimination only by "any program or activity receiving Federal financial assistance," and because the State itself is neither a "program" nor an "activity," *see* 42 U.S.C. § 2000d-4a (1988), Title VI should be construed to repeal the sovereign immunity of state agencies but not the immunity of the states themselves.

We reject this argument. There is nothing in the terms of Title VI that indicates that an entity must be a "program or activity" if it is to be sued for a violation of Title VI. On the contrary, the plain language of § 2000d-7(a)(1) quite clearly provides that the Eleventh Amendment immunity of the state itself is abrogated, and it does not differentiate in any way between the immunity of the state and that of its instrumentalities. This plain-language meaning is arguably reinforced by the fact that Congress amended Title VI to make clear that the statute authorizes suit against an entire system for the discriminatory practices of a discrete program within that system receiving federal funds. *See* Pub. L. No. 100-259, § 6, 102 Stat. 28, 31 (1988) (codified at 42 U.S.C. § 2000d-4a); *Board*

of Educ. v. Georgia, No. CV 490-101, slip op. at 15-16 n.7 (S.D.Ga. Sept. 24, 1990). Moreover, nothing in the legislative history of Title VI compels the conclusion that an entity must be a "program" or "activity" to be a Title VI defendant. *See Association of Mexican-American Educators v. California*, 836 F.Supp. 1534, 1542-43 (N.D.Cal. 1998) (reviewing the legislative history of Title VI and concluding that the State of California was a proper Title VI defendant). We therefore hold that the State of New York can be sued under Title VI as long as it, along with those of its agencies receiving federal financial assistance, is alleged to have been responsible for a Title VI violation.[25] *Accord id.* at 1543; *Board of Educ. v. Georgia*, slip op. at 15-16.

We also reject the State's argument relating to the Board of Regents' and SED's amenability to suit under Title VI. The State concedes that both of these agencies, "as 'program[s] or activit[ies] receiving Federal financial assistance' . . . are proper defendants to a Title VI claim of discrimination occurring after October 21, 1986 . . ." State Post-Trial Brief at 18. The State contends, however, that the evidence presented at trial related only to State conduct occurring before 1985, and that pre-1985 conduct cannot give rise to a violation of

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[25] Plaintiffs have alleged that the State of New York, in the form of the State Legislature, contributed to the school segregation in Yonkers by, *inter alia*, passing and debating bills designed to limit the efficacy of State desegregation efforts and refusing to provide the financial support necessary for successful desegregation. *See, e.g.*, Second Amended Complaint of Plaintiff-Intervenors Yonkers Branch NAACP, et al., ¶¶ 20-25, 35, 37; Cross-Claim of the Yonkers Board of Education, ¶¶ 14-23, 30.

Contrary to what the State urges, neither the First Amendment nor the Speech and Debate Clause of Article 1, § 6 of the Constitution is implicated by a holding that acts and omissions of the State Legislature furnish the basis for a claim against the State under Title VI. The issue is not whether members of the State Legislature are to be punished under the Constitution or a federal statute for what was said and done in the Legislature during the years in question in this lawsuit. Rather, the issue is whether the State's attitude toward desegregation, as made known through what was said and done in the State Legislature, properly gives rise to an allegation that the State, along with its instrumentalities, contributed to a violation of rights for which the remedy of a lawsuit in federal court has been explicitly provided.

Title VI in light of the effective date of that statute's non-retroactive abrogation of immunity (October, 21, 1986). The State further contends that the continuing *effects* of any discriminatory practices engaged in prior to October 21, 1986 are not actionable under a "continuing wrong" theory. The idea here is that the non-retroactive nature of Title VI's abrogation would effectively be nullified if the "continuing wrong" theory were allowed to make actionable acts occurring before the effective date of the statute.

The State is correct in pointing out that the presentation of evidence was limited, by agreement of the parties and the Court, to State conduct occurring prior to 1985. *See supra* p. 2. This fact alone does not insulate the State from the reach of Title VI, however, for unlike the State, we do not see a problem in respecting both the non-retroactive nature of Title VI's abrogation of immunity and the integrity of the principle that holds that a state violates the Fourteenth Amendment for as long as it fails to eliminate policies and practices traceable to a prior system of *de jure* segregation which it helped create. The "continuing wrong" theory collapses, in the unique context of equal opportunity in schooling, the traditional legal distinction between harmful acts, on the one hand, and their consequences or effects, on the other.[26] If, then, the pre-1985 acts of the State defendants contributed to the maintenance of a dual school system in Yonkers (a question the merits of which we address below), those acts can be said to be occurring *to this day* to the extent their effects have yet to be remedied.[27] The non-retroactive nature of Title VI's abrogation,

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[26] As we discuss below in our section on the UDC, this is not the case with regard to actions taken by governmental actors in areas other than education. *See infra* p. 68.

[27] The State's position throughout this litigation has been that it did not intentionally support or contribute to the segregation in the Yonkers schools. The State has never made an alternative argument to the effect that, even if it *did* intentionally support or contribute to segregation in Yonkers prior to 1985, it has since taken the steps necessary to eliminate the effects of its unconstitutional acts. Indeed, the Court has already found, in a separate proceeding, that vestiges of segregation do continue to exist in the Yonkers schools. *See United States v. Yonkers*, 833 F.Supp. 214 (S.D.N.Y. 1993).

with its October, 1986 cut-off date, therefore properly does not bar this suit. *See Fordice*, 112 S.Ct. at 2743 ("To the extent that the State has not met its affirmative obligation to dismantle its prior dual system, it shall be adjudged in violation of the Constitution and *Title VI* and remedial proceedings shall be conducted") (emphasis added).[28]

It is equally clear, however, that the non-retroactivity of Title VI is to be given full effect in those situations where a "continuing wrong" theory does not apply. A state that successfully integrated a once-dual school system *prior to* October, 21, 1986, for example, would presumably be protected from a suit for damages by § 2000d-7(b).

In light of the foregoing, we hold that the Board of Regents and the SED, like the State of New York itself, may be sued under Title VI. And we conclude overall that the Eleventh Amendment does not bar this suit as it relates to any of the defendants with the one exception of Governor Cuomo.

2. *The Merits*

All of which brings us to the critical legal issues:

a) Is the State liable under 42 U.S.C. § 1983 for knowingly tolerating *de jure* segregation in Yonkers?

b) Is the State liable under 42 U.S.C. § 1983 for dealing with integration in a manner different from other educational matters?

c) Is the State liable under The Equal Educational Opportunities Act of 1974, 20 U.S.C.A. § 1701 *et seq.* (West 1990) ("EEOA")? Is this issue properly before the Court?

a. *Liability under § 1983*

The YBE and NAACP, in urging that the State is liable on a joint tortfeasor theory under § 1983 because it knowingly failed to address segregation in the Yonkers Public School System, although having a self-imposed duty to do so, rely

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[28] The *Fordice* Court appeared to assume, without actually deciding, that post-October, 1986 vestiges of pre-October, 1986 discriminatory acts are actionable under Title VI.

primarily on a trilogy of cases arising in Ohio. *See Brinkman v. Gilligan*, 610 F.Supp. 1288 (S.D. Ohio 1985); *Penick v. Columbus Bd. of Educ.*, 519 F.Supp. 925 (S.D. Ohio 1981), *aff'd*, 663 F.2d 24 (6th Cir. 1981), *cert. denied*, 455 U.S. 1018 (1982); *Reed v. Rhodes*, 500 F.Supp. 404 (N.D. Ohio 1980), *aff'd*, 662 F.2d 1219 (6th Cir. 1981), *cert. denied*, 455 U.S. 1018 (1982).

In these cases, the courts dealt with the question of whether state inaction in the face of continued segregation in Dayton (Brinkman), Columbus (Penick), and Cleveland (Reed) triggered state liability. Each court answered the question in the affirmative.

In language strongly relied on by the YBE and NAACP, the court wrote in *Reed* that:

> The failure of the State Board to take actions intended to eliminate segregation can, when combined with other facts, support a finding of constitutional violation, for 'the Constitution can be violated by inaction as well as deeds.' [citations omitted] Thus, a state which initially compelled or authorized the creation of a local dual system of education has a continuing affirmative duty to eradicate all lingering effects of segregation; the neglect of that constitutional duty renders the State liable. . . . Even if a State took no part in the creation of a local dual system of public education, it can be liable with local officials if it or its agents adhered to a deliberate policy of tolerating or supporting intentional racial segregation.

500 F.Supp. at 424. Although the court in *Reed* found inaction, "when combined with other facts", to be a basis for state liability in Ohio, it cited with approval the holding of the Second Circuit in *Arthur v. Nyquist*, 573 F.2d 134 (2d Cir. 1978), *cert. denied*, 439 U.S. 860 (1978), that a state's knowing failure to meet its obligation to eradicate segregation is insufficient to impose liability on the state. 500 F.Supp. at 424.

In *Brinkman*, the court concluded that:

> Had the state defendants acknowledged their affirmative obligations under state and federal laws to investigate

> and eliminate segregation and had the power to withhold state funding been exercised, there is a substantial probability that the Dayton schools would not be in the condition found to exist in 1972. The failure of the state defendants to exercise their obligations promptly under state and federal law was a proximate cause of the plaintiffs' deprivation . . . .

610 F.Supp. at 1297. *See also Penick*, 519 F.Supp. at 941-42.

Of course, there are significant factual distinctions between the Ohio cases and this New York case, the most apparent perhaps being the initial responsibility of the State of Ohio for the creation of a dual school system. *See Brinkman*, 610 F.Supp. at 1293.[29] Nonetheless, were the Ohio cases to stand alone, we would find them highly persuasive.

But the Ohio cases do not stand alone; they must be considered together with *Arthur v. Nyquist*. In *Arthur*, suit was brought against the Commissioner of Education of the State of New York and the members of the Board of Regents, as well as against local Buffalo education officials. The district court found these defendants liable for intentionally causing and maintaining a segregated school system in Buffalo, and the Court of Appeals affirmed as to the local defendants. As to the state parties, however, the Court reversed.

The Court first noted that as early as 1960, the Board of Regents had issued a policy statement urging desegregation of the New York public schools. The Court next noted that the Commissioner had responded to a § 310 complaint filed in 1964 by requiring the Buffalo School Board to submit plans to desegregate. A plan submitted by the Buffalo Board failed to be implemented because the Buffalo City Council refused to appropriate funds. 573 F.2d at 145.

In 1972, the Commissioner instructed the Buffalo Board to submit a new plan, but it refused to do so. The Commissioner's staff then drew up and submitted its own recommendations to the Buffalo Board, but the Board rejected the proposals. Finally, in 1975, the Commissioner issued a show

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29 New York has outlawed *de jure* segregation since 1900.

cause order to the Buffalo Board in which he threatened to exercise his statutory enforcement powers. In 1976, the *Arthur* class action was started.

The Court of Appeals began its legal analysis by noting that:

> Authority over education in New York State is vested in the Department of Education, which manages and supervises all New York State public schools. . . . The Commissioner is responsible for the implementation of educational policy formulated by the Board [of Regents]. He can enforce his directives by removing any school officer or member of a board of education who disobeys an order, and by withholding funds from a disobedient school system.

573 F.2d at 146.

The Court then wrote, in language highly relevant to these proceedings:

> Appellees argue on this appeal that, having primary responsibility for educational policy in New York State, the state appellants are liable for Buffalo's school segregation. They assert that the appellants are liable both because they failed to combat segregation as aggressively as they might have, and, in a derivative sense, because they are legally responsible for the City's segregative acts.
>
> We cannot disagree with the trial court's finding that it would have been possible for the state appellants to have intervened more forcefully in this matter. [30] Nor can we say that, given the chosen policies of the state appellants, it was unforeseeable that the Buffalo schools might remain segregated for an extended period of time.

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30 We note that this statement would apply *a fortiori* to Yonkers, since by virtue of the § 310 proceedings, the State played a far more active role vis-a-vis the Buffalo segregated schools than it did vis-a-vis the Yonkers segregated schools.

We do not, however, believe that this kind of inaction on the part of state supervisory personnel can, under the standards promulgated by the United States Supreme Court, be said to constitute intentional segregation, and hence a constitutional violation. As we indicated in *Hart v. Community School Board*, *supra*, 512 F.2d at 48:

> We assume that mere inaction, without any affirmative action by the school authorities, allowing a racially imbalanced school to continue, would amount only to *de facto* rather than *de jure* segregation.

To argue otherwise would be to adopt the strictly objective view of segregative intent rejected above because it collapses *de facto* and *de jure* segregation, in effect making all continued toleration of segregation *de jure*. The state appellants have shown that legitimate policy considerations warranted their hesitation in intervening actively in the conduct of the Buffalo school system, and that the drastic remedies available to them could legitimately have been judged inappropriate under the circumstances of this case.

Of course, if it could be shown that state and local officials conspired to thwart state anti-segregation policy, our conclusion would perforce be different. But we have searched the record, and are unable to find any indication of such complicity, posturing, or bad faith.

Similarly, we do not believe that the appellees' theory of derivative or indirect liability can be sustained. Such a theory is precluded by the Supreme Court's opinion in *Rizzo v. Goode*, *supra*, 423 U.S. 362, 96 S.Ct. 598, 46 L.Ed.2d 561, which requires a more direct link between the illicit school segregation and an intentional policy adopted by the state appellants which indicates specific approval of the actions of the city appellants. No such approval is indicated in this case.

> Under the standard announced in *Hart*, then, we are unable to conclude that the state appellants acted or omitted to act with the required segregative intent, and hence we must reverse the trial court's finding of liability as to these appellants.

573 F.2d at 146.

Although it is the case that in Buffalo there was a state response in progress to a § 310 proceeding and that no § 310 proceeding occurred in Yonkers, it is a close and difficult question whether the issues before this Court are qualitatively different from those dealt with by the Court of Appeals in *Arthur v. Nyquist*. The *Arthur* Court acknowledged the power that resided in the state educational authorities to deal with segregation in Buffalo and accepted the proposition that, "given the chosen policies of the state appellants, it was [not] unforeseeable that the Buffalo schools might remain segregated for an extended period of time." 573 F.2d at 146. But, the *Arthur* Court tells us, more than knowledge of wrongdoing and the power to end it is required before § 1983 liability can be imposed on a state. What else is required? If it can be shown that state and local authorities conspired to thwart state desegregation policies, the result would be different. If it can be shown that state officials gave local authorities *specific* approval, and thereby support, of their unlawful conduct, the result would be different. But the *Arthur* Court searched the record in vain for evidence of such complicity and approval, and we have engaged in a like inquiry, with like results. *See supra* pp. 22-23. The closest one approaches to approval is, in our opinion, the determination by the Commissioner and his staff not to recommend to the Legislature that funding proposals for the benefit of local school communities be made contingent on adoption of desegregation programs. But the reason advanced was a concern that the legislation would fail in its entirety, not a desire to perpetuate segregation.

Indeed, there is no evidence of any affirmative pro-segregative action on the part of the State. The reining in of Commissioner Nyquist and the adoption of less aggressive integration statements over the course of the 1970's are com-

pelling evidence that the State's policy with respect to local segregation grew increasingly passive and reactive, but the policy cannot fairly be categorized as being affirmatively in favor of segregation. State permissiveness and, in truth, state hypocrisy in the face of local segregation are not automatically tantamount to state encouragement and/or authorization of segregation. *See Arthur*, 573 F.2d at 146. That anti-desegregation groups in Yonkers tried to find in the State's permissiveness signs of actual, positive support for their position says something about the political forces at work in Yonkers; but it does not without more transform the State's failure to intervene in Yonkers affirmative support of school segregation in Yonkers, from a legal standpoint. *Cf. Reitman v. Mulkey*, 387 U.S. 369, 373-81 (1967) (concluding, in the context of a state-action inquiry, that the California legislature actually encouraged private acts of discrimination by expressing its "policy of neutrality" in the form of an amendment to the state constitution which prohibited, in ringing terms, any interference with such acts of discrimination).

Since we are unable to find, after an exhaustive inquiry, conduct on the part of the State which would satisfactorily distinguish this case from *Arthur v. Nyquist*, and since this case, rather than the Ohio precedents, is controlling on this Court, we answer in the negative the question of whether the State may be held liable for knowingly tolerating, *i.e.*, for not proceeding aggressively against, the *de jure* segregation that existed in the Yonkers schools.

b. *Liability for dealing with integration in a manner different from other educational matters*

The YBE and NAACP urge a second theory of state liability under the Equal Protection Clause and § 1983 which has not so much to do with the nature of the State's involvement in Yonkers as it does with the inconsistent and racially-identifiable manner in which the State pursued its various policy goals. Plaintiffs argue:

> [E]ven without regard to the intent underlying its conduct, the State unlawfully established an 'explicitly

> racial' classification by singling out the racial integration policy as the one State education policy that would not be executed in accordance with the normal process of governance and decision making for education in New York State.

YBE Post-Trial Brief at 2.

We have found that the State's policy of passivity with regard to school segregation matters was atypical conduct on the part of the State; in all other areas of concern, the State adopted regulations and aggressively monitored and enforced compliance with State education policy. *See supra* p. 19. If, then, the operative legal principle here is what plaintiffs suggest—that a state violates the Equal Protection Clause if it singles out its race-oriented policies for neglect or lackluster enforcement—the facts of this case would probably compel a finding of liability on the part of the State.

However, we have neither found nor been directed to any authority that holds that, wholly apart from the question of whether a state is jointly responsible with local actors for acts of racial discrimination, a state violates the Equal Protection Clause if it fails to enforce its race-oriented policies as vigorously as its non-race-oriented policies. There is, to be sure, ample authority for the proposition that a state cannot, consistently with equal protection, pass a statute or other promulgation that has the practical effect of restructuring the governmental decision-making apparatus in a way that imposes unique burdens on racial minorities seeking to enact legislation. In *Hunter v. Erickson*, 393 U.S. 385 (1969), for example, the Supreme Court struck down an amendment to the city charter enacted by the citizens of Akron, Ohio, which required that any fair housing ordinance be approved by a majority of the city electorate, whereas all other ordinances could be passed by a vote of the city council itself. The Court found that the Akron amendment

> drew a distinction between those groups who sought the law's protection against racial, religious, or ancestral discriminations in the sale and rental of real estate and

> those who sought to regulate real property transactions in the pursuit of other ends. Those who sought, or would benefit from, most ordinances regulating the real property market remained subject to the general rule: [passage by vote of the city council]. But for those who sought protection against racial bias, the approval of the City Council was not enough. A referendum was required by charter at a general or regular election, without any provision for use of the expedited special election ordinarily available.
>
> . . .
>
> Even though Akron might have proceeded by majority vote at town meeting on all its municipal legislation, it has instead chosen a more complex system. Having done so, the State may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person's vote or give any group a smaller representation than another of comparable size.

393 U.S. at 390, 392. Similarly, in both *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457, 487 (1982), and *Lee v. Nyquist*, 318 F.Supp. at 720, it was held that laws limiting the extent to which certain educational authorities could assign students to schools on the basis of race worked a practical restructuring of the decision-making process as it related to education, and did so to the obvious detriment of those citizens who desired to improve the situation of racial minorities in the schools.

In each of these three cases, the equal protection violation lay in the fact that the state had adopted measures making it more difficult, from a procedural standpoint, to address racial issues in ways beneficial to racial minorities. Each of the challenged provisions created a procedural "gauntlet" that only those interested in the well-being of minority citizens were required to run. *Hunter*, 393 U.S. at 390. Each provision singled out race as the one factor that warranted altered legislative procedures and redirected lines of policy-making

authority. And, not coincidentally, each provision had the intended effect of hampering the achievement of racial equality.

Though the principles stated in *Hunter*, *Washington*, and *Lee* are compelling, they cannot be stretched to cover the facts of this case. It is certainly true that, owing to its passivity, the State addressed racial issues in education in ways that were less than optimally beneficial to racial minorities. But it cannot be said that the State defendants distorted the governmental process by adopting measures making it more difficult to pursue a political path supportive of school desegregation. With the exception of Chapter 342, which was declared unconstitutional shortly after its passage, the State did not rig the political system in a way that "assist[ed] one particular group in its struggle with its political opponents." *Hunter*, 393 U.S. at 393 (Harlan, J., concurring). Decision-making power was not abruptly shifted from central to local authorities (*see Lee*), or vice versa (*see Washington*), when it came to educational decisions bearing racial overtones. Rather, decision-making authority stayed where it always had been—with State educational authorities—and continued to be as susceptible to majority rule as ever. While some New York citizens may understandably have disliked the fact that the State did not push vigorously for desegregation, they were no more disadvantaged politically in their ability to seek changes in State policy than those who cheered the status quo.

It is these facts that distinguish this case from *Hunter*, *Washington*, and *Lee*. As Justice Harlan noted in *Hunter*, it is one thing for supporters of racial equality to have to fight legislative battles with their hands tied behind their backs; it is another (quite constitutional) thing for supporters of racial justice to fail to win a majority of the votes needed to prevail in an equally-weighted voting system. 393 U.S. at 394-95 (Harlan, J., concurring). Though State legislators and State education officials undoubtedly acted with racial consciousness in making decisions about segregation in the schools, they did not act pursuant to a voting scheme that weighted the votes in their favor. They therefore did not act pursuant to any

racial classification that the courts have heretofore found constitutionally untenable.

For the foregoing reasons, then, we reject plaintiffs' second argument for the imposition of liability on State educational authorities for the school segregation in Yonkers. We cannot conclude that, in the absence of any other constitutional violation, the State acted pursuant to a racial classification that was unconstitutional.[31]

c. *Liability under the EEOA*

Before addressing the merits of the claims raised in regard to the UDC and housing, it is important to note the dialogue the Court has had with the parties relating to the relevance of a federal statute that was not otherwise cited by the plaintiffs in their complaint against the State nor relied upon by them as to any substantive questions of liability.[32] The EEOA provides in relevant part that:

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31 The United States Supreme Court has decided to review a decision by the Colorado Supreme Court holding that a state constitutional amendment that prohibits considerations of sexual orientation from being used as grounds for preferential treatment or "protected status" violates the Equal Protection Clause. *See Evans v. Romer*, 882 P.2d 1335 (Colo. 1994), *cert. granted*, 115 S.Ct. 1092 (1995); *Evans v. Romer*, 854 P.2d 1270 (Colo.), *cert. denied*, 114 S.Ct. 419 (1993). The Colorado Supreme Court based its ruling on its conclusion that the state amendment infringes the fundamental right of citizens to participate in the political process on equal terms by making it comparably more difficult for members of an "identifiable group" (*i.e.*, those of homosexual or bisexual orientation) to win passage of legislation in their interest. 854 P.2d at 1282. The court assumed, without deciding, that gay men, lesbians, and bisexuals do not constitute a suspect class. *Id.* at 1275. The Colorado case thus concerns the extent to which, *in the absence of a suspect class*, a state may remove from the normal, sub-constitutional legislative process issues that are of particular concern to discrete groups of citizens.

Here, however, plaintiffs sue on behalf of a group recognized by the courts to be a suspect class. This case accordingly presents different issues from those raised in *Romer*.

32 Neither the NAACP's Second Amended Complaint nor the YBE's Cross-Claim against the State includes any citation to the EEOA. However, the NAACP did rely on the EEOA for jurisdictional purposes in its papers in opposition to the State's motion to dismiss. *See* Plaintiff-Intervenors' Reply To State Defendants' Motion To Dismiss at 14-15 (filed with the Court on June 9, 1989).

> No State shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by (a) the deliberate segregation by an educational agency of students on the basis of race, color, or national origin among or within schools; (b) the failure of an educational agency which has formerly practiced such deliberate segregation to take affirmative steps . . . to remove the vestiges of a dual school system . . . .

Id. § 1703. For the purposes of § 1703, an "educational agency" is either "a local educational agency or a 'State educational agency' as defined by [20 U.S.C. § 2891]." *See* 20 U.S.C. §§ 1720(a), 3381. Section 2891 defines "local educational agency" as including public boards of education, such as the YBE. It defines "State educational agency" in a way that clearly includes both the SED and the Board of Regents: "The term 'State educational agency' means the officer or agency primarily responsible for the State supervision of public elementary and secondary schools." Section 1706 of the EEOA then permits

> an individual denied an equal educational opportunity, as defined by this subchapter[, to] institute a civil action in an appropriate district court of the United States against such parties, and for such relief, as may be appropriate.

Finally, § 1714 of the EEOA provides that:

> No court, department, or agency of the United States shall, pursuant to section 1713 of this title [prioritizing various remedial measures], order the implementation of a plan that would require the transportation of any student to a school other than the school closest or next closest to his place of residence which provides the appropriate grade level and type of education for such student.

In the course of addressing the issues raised by the plaintiffs' claims against the State, the Court itself considered whether the EEOA might be of some relevance. By telephone

conference, followed by an order dated February 28, 1995, the Court alerted the parties to its consideration of the possible substantive impact of the EEOA on these proceedings. The concern with the EEOA arose because the plain language of the statute seems to provide a basis for holding a state vicariously liable for the discriminatory acts of local educational authorities. Indeed, it can be argued that if one were to set about to write a statute in away that provided for vicarious state liability, one could not find language that was more clear and direct than that contained in § 1703 of the EEOA. The literal meaning of § 1703 is that a state denies an individual an equal educational opportunity by virtue of the discriminatory acts of local educational actors, without regard to the nature of the state's own involvement in the local schools. No "direct link" between the local violation and an intentional state policy, nor any "complicity," "posturing," or "bad faith" on the part of the state (the *Arthur* formulations) is required by § 1703's language before the state can be held accountable for a denial of equal schooling in a federal action brought pursuant to § 1706.

The one case that has interpreted the EEOA in the desegregation context has concluded that the EEOA does authorize a form of derivative state liability. In *United States v. School District of Ferndale*, 577 F.2d 1339 (6th Cir. 1978), the plaintiffs alleged, much as they do here, that the state defendants had known that local educational authorities were operating the schools in a racially segregated manner, and that, notwithstanding this knowledge, they continued to aid the maintenance of segregation "through the provision of state funds . . . [and by] failing and refusing to take any necessary or appropriate action to bring the operation of the [local] schools into compliance with the Fourteenth Amendment . . . ." 577 F.2d at 1346-47. The lower court dismissed the state defendants from the action on the grounds that, even if the state defendants were guilty of the alleged acts, they had not violated the substantive protections of the EEOA as contained in § 1703(a), (b) and (d).

The Sixth Circuit reversed the order of dismissal.

> The gravamen of the complaint against the State defendants is not that they directly engaged in discriminatory assignment of students and teachers, but that they tolerated and provided assistance to a local school district which they knew to be engaging in such practices. The District Court apparently felt that the statute applied only to direct acts of discrimination, not to indirect assistance to districts violating the [EEOA].
>
> We do not believe that the State can escape liability under the [EEOA] merely because its support for the proscribed actions was indirect. . . . Congress plainly intended that the practices listed in § 1703 be ended. Such a goal can only be subverted by allowing states to knowingly support the prohibited practices with impunity. This is particularly true where state assistance forms a sizable part of the local school district's budget. We seriously doubt that Congress intended to allow states to bankroll dual school systems, while enacting a statute specifying remedies for the elimination of such systems.

577 F.2d at 1347-48 (citations omitted).[33] *See also Idaho Migrant Council v. Board of Educ.*, 647 F.2d 69, 70-71 (9th Cir. 1981)

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[33] The *Ferndale* Court appeared to believe that the standard of state liability under § 1703 of the EEOA was coextensive with the standard of state liability under 42 U.S.C. § 1983. *See* 577 F.2d at 1348 (noting that the same principle of joint liability animates the two statutes). *But see id.* at 1346 (reserving decision on whether the rights guaranteed by the two statutes are the same). The State relies on this fact to argue that *Arthur v. Nyquist*, setting forth the Second Circuit's construction of state liability under § 1983, controls any interpretation of § 1703 of the EEOA, such that if plaintiffs lose under *Arthur*, they lose under the EEOA. *See* The State Defendants' Brief in Response to the Court's February 28, 1995 Order at 9-10.

However, as discussed above, the Sixth Circuit has interpreted liability under § 1983 in a more expansive way than the Second Circuit. *See supra* part III.A.2.a. Any conclusion on the Sixth Circuit's part that the EEOA imposes the same substantive duties as § 1983 is attributable, in our view, to its more expansive reading of § 1983 rather than to an overly broad interpretation of the scope of the duties imposed by the EEOA.

(construing § 1703(f) of the EEOA to impose upon the states the supervisory duty of ensuring that local educational authorities do not fail to take action to overcome language barriers that impede equal participation in the schools).

In response to this Court's February 28, 1995 Order, the parties filed briefs. The YBE took the position that the EEOA was not of significance here because, like the State, it believed that the parameters of liability under the EEOA were coterminous with those under § 1983. But, as the YBE recognized, *see* Yonkers Board of Education's Supplemental Brief in Response to the Court's Order of February 28, 1995 at 8, the language of the EEOA on its face appears to impose on the states the very type of supervisory liability for the conduct of local actors that the *Arthur* decision foreclosed. Moreover, since the *Arthur* Court's ruling that a state is not liable unless it acts affirmatively to foster segregation relates exclusively to an action brought under § 1983, and since the *Arthur* decision does not discuss the EEOA,[34] *Arthur* is not binding with respect to a finding of liability under the latter statute.

The NAACP took the position that the EEOA imposes on states the duty to ensure that segregative practices on the part of local educational agencies are stopped, and that a state's failure to so ensure renders it liable under the statute. The NAACP characterized the duty imposed by the EEOA as "coextensive with the Fourteenth Amendment, if more pointed and specific." Plaintiff-Intervenors' Memorandum of Law on Applicability of 20 U.S.C. sec. 1701 et seq. at 2-4 & n.2.

The State, in addition to reasserting its position regarding the sovereign immunity implications of the EEOA and contesting the nature of the substantive rights guaranteed by it, argued that the legislative history of the EEOA persuasively indicates that Congress intended the statute to be an anti-busing measure and not a basis for expanding state liability in school desegregation cases. Moreover, the State argues that the limitations on remedies imposed by the EEOA, which include limits on the use of involuntary busing, *see* 20 U.S.C.

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[34] Neither the *Arthur* decision itself, nor the pleadings and briefs filed in the case, contains any citation or reference to the EEOA.

§ 1714, relate to the totality of a remedial scheme ordered by a court, and thus would preclude resort to the EEOA in a case, such as this one, in which a remedy order imposed a decade ago and still in force utilized busing.

The Court finds the question whether it should *sue sponte* rely on the EEOA for the purpose of assessing the State's liability on the schools issue to be an extremely troublesome one. On the one hand, the issues relating to the EEOA are purely legal questions, and a voluminous record has been compiled in this case which is entirely relevant to EEOA liability. Failure to address the question of EEOA liability might lead to the commencement of a new proceeding explicitly predicated on that statute, with an attendant waste of resources by the litigants and the courts.

On the other hand, plaintiffs, aided by able counsel with vast experience in school desegregation litigation, have chosen not to move to amend the complaint to encompass an EEOA claim and have only equivocally embraced a reliance on that statute.

On balance, we conclude that the most prudent course of action is to confine this opinion solely to the issues directly presented by the parties, *i.e.*, the State's liability under § 1983 and other claims explicitly stated in the complaint. We leave to another day and any further application of the parties the question of whether, in the context of the Yonkers desegregation proceedings, the EEOA provides any basis for relief from the State.

B. *Housing*

1. *Introduction*

We turn next to the questions relating to the State's role in site selection and development of housing in light of this Court's prior determination, *see* 624 F. Supp. at 1500-1503, affirmed by the Court of Appeals, *see* 837 F.2d at 1233, that there is a close interrelationship between school segregation and segregative housing patterns in Yonkers, each affecting and aggravating the other.

The YBE and NAACP claim that the UDC's actions relating to site selection for housing in Yonkers create an independent ground for liability against the UDC. Alternatively, they claim that these actions by the UDC can be imputed to the State or to State education officials in order to find these defendants liable. Finally, they appear to make the argument that the conduct of the State education officials themselves must be evaluated in a context that includes recognition of the housing conditions in Yonkers and that this circumstance distinguishes this case from *Arthur v. Nyquist*. In essence, this final contention is that the State's affirmative role in site selection for Yonkers housing provides the "something more" than mere passive condoning of segregation which the Court found in *Arthur v. Nyquist* and which this Court has found herein, absent a consideration of the housing aspects of this case.

The YBE and NAACP rely on a number of cases in which state participation in housing has been a basis for imposition of state liability for school segregation. In a case concerning the city of Indianapolis, for example, the Seventh Circuit held:

> Undoubtedly there are many contributing causes for racial segregation. But however complex the problem, it is clear that if residential segregation results from current or past segregative housing practices, there is a causal relation between those practices and the segregated schools. Therefore, *if the state has participated in or contributed to these segregative housing practices* either directly (e.g., selective location of public housing) or indirectly (e.g., involvement in discriminatory practices in the private housing market), *it can be said that the state has caused, at least in part, the segregation in schools*.

United States v. Board of Sch. Comm'rs, 573 F.2d 400, 408-09 (7th Cir.) (emphasis added) (footnote omitted), *cert. denied*, 439 U.S. 824 (1978). In particular, the YBE and NAACP point to cases in which courts have held states liable due to the participation of state agencies in the development

and concentration of segregated housing within a city. *See, e.g., Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist. No. 1*, 778 F.2d 404, 426 (8th Cir. 1985), *cert. denied*, 476 U.S. 1186 (1986); *Evans v. Buchanan*, 393 F.Supp. 428, 435, 438 (D. Del. 1975), *aff'd*, 423 U.S. 963 (1975); *Oliver v. Kalamazoo Bd. of Educ.*, 368 F.Supp. 143, 183 (W.D. Mich. 1973), *aff'd sub nom., Oliver v. Michigan State Bd. of Educ.*, 508 F.2d 178 (6th Cir. 1974), *cert. denied*, 421 U.S. 963 (1975).

2. *Claims Against the UDC and its Present Director; Statute of Limitations*

The State urges that plaintiffs' claims against the UDC and its present director are barred, as a matter of law, by the statute of limitations. The statute of limitations for actions under both § 1983 and Title VI is that applicable to personal injury actions in the state in which the appropriate federal court sits. In New York, this time period is three years. *See Owens v. Okure*, 488 U.S. 235, 251 (1989) (§ 1983); *Dory v. Ryan*, 999 F.2d 679, 681 (2d Cir. 1993) (same), *modified*, 25 F.3d 81 (2d Cir. 1994); *Mussington v. St. Luke's-Roosevelt Hosp. Ctr.*, 824 F.Supp. 427, 433 n.4 (S.D.N.Y. 1993) (title VI), *aff'd*, 18 F.3d 1033 (2d Cir. 1994) (*per curiam*); *Barcia v. Sitkin*, 89 F.R.D. 382, 385 (S.D.N.Y. 1981) (same). A claim accrues for purposes of the statute of limitations when the discriminatory act occurs and plaintiffs know or have reason to know of it, even though the "most painful" effects of the discrimination may occur later. *Delaware State College v. Ricks*, 449 U.S. 250, 258 (1980) (quoting *Abramson v. University of Hawaii*, 594 F.2d 202, 209 (9th Cir. 1979)); *Morse v. University of Vermont*, 973 F.2d 122, 125 (2nd Cir. 1992). "The relevant date is when the 'operative decision' to act is made, since it is the decision, rather than the action itself, which is the basis of a discrimination claim." *Mussington*, 824 F.Supp. at 432 (citing *Chardon v. Fernandez*, 454 U.S. 6, 8 (1981) (*per curiam*)).

The State urges, and we agree, that any improper operative decisions by the housing defendants in this case occurred by

1972, and certainly by 1975. The UDC's selection of sites for the construction of housing in Yonkers was made pursuant to a Memorandum of Understanding entered into with the City in July 1970 and amended in 1971 and 1972. YBE Exhs. 19-81; 19-113; 19-174. There is no evidence that the UDC's site selection activities after 1972 produced any housing. Moreover, these activities ceased altogether in 1975, when the State bailed out the UDC from fiscal disaster and effectively ended its housing program. YBE Exh. 6-66; YBE Exh. 20-63 at ¶ 10; Tr. 1690-92 (Danielson). Since plaintiffs knew or should have known of the UDC's site selections at the time and did not commence this suit until 1987, we find that their claims against the UDC are barred by the three year statute of limitations.[35]

The YBE and NAACP urge that the statute of limitations is not a bar because the UDC has a continuing obligation to take corrective action to eliminate all vestiges of segregation to which it has contributed. This duty, it is contended, remains in force until all vestiges of segregation in the school system have been eradicated, an event which this Court has already held has not yet occurred. *See* 833 F.Supp. at 225.

We agree, however, with the State that there is no authority for applying a "continuing wrong" theory to the housing defendants here. Although the courts have held some governmental entities to have an affirmative duty to take steps to eliminate the effects of past school segregation and have found a failure to take these steps to be a continuing violation

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[35] The State housing defendants alternatively argue that plaintiff's claims should be barred by the equitable doctrine of laches. We disagree. Defendants assert that they have suffered prejudice by virtue of their absence from the lengthy discovery and trial proceedings involving the liability of the City of Yonkers and the YBE. However, defendants' only significant showing of prejudice is the unavailability of one witness, Frank Kristof, who we find was not the sole repository of any critical testimonial evidence. *See* Tr. 2311-17 (Winnick). As we stated in an earlier opinion, it can be wondered, in light of the voluminous record already compiled at the expense of other parties, whether defendants should view their belated joinder in this litigation as a bane or a blessing. *See United States v. City of Yonkers*, No. 80 Civ. 6761, 1989 WL 88698, at *1 (S.D.N.Y. Aug. 1, 1989).

of the affirmative duty, *see Penick*, 443 U.S. at 458-59; *Green v. County Sch. Bd.*, 391 U.S. 430, 437 (1968), this doctrine seems to have been limited only to defendants with an ongoing, pervasive role in matters directly affecting school attendance zoning. *See Richmond v. Croson*, 488 U.S. 469, 524-25 (1989) (Scalia, J., concurring); *Bazemore v. Friday*, 478 U.S. 385, 408 (1986) (White, J., concurring). The rationale for finding a continuing wrong by school authorities in these cases is that every assignment by school authorities of a minority student to a minority school is a new discriminatory act. *See Palmer v. Board of Educ.*, Nos. 93-3591, 94-1229, 1995 WL 42819, at *4 (7th Cir. Feb. 3, 1995) (Easterbrook, J.). As defendants point out, "[t]here is no evidence, however, that UDC had such power over schools, students, or attendance lines, or assisted the Board in its exercise of such powers." State Post-Trial Brief at 73. Therefore, since the UDC's activities in Yonkers took place within a finite time interval and ceased entirely in 1975, this suit, commenced in 1987, cannot be maintained. We accordingly dismiss the claims against the UDC and its present director.

3. *Housing-Based Claims Against the State Education Defendants*

It remains to be examined, however, whether the actions of the UDC can be imputed to the State education defendants or whether these defendants, acting with knowledge and awareness of Yonkers housing developments, are liable for what they did or failed to do in Yonkers in light of such knowledge. If these defendants are so liable, it is clear that their violations are continuing ones and that the statute of limitations does not apply. *See Penick*, 443 U.S. at 458-59; *Green*, 391 U.S. at 437.

The YBE apparently argues that this Court should impute the actions of the UDC to either the State or to State education officials in order to hold these defendants liable. YBE Post-Trial Brief at 25-26. We disagree. As the State asserts, "[t]he absurdity of the argument is that it would allow the Board to sue the State as liable for the actions of the Board

itself." State Post-Trial Brief at 55. The circumstances under which acts of a subdivision or creation of the state may be imputed to the state or to one of its agencies are far more limited than the YBE suggests. *See Washington*, 458 U.S. at 480-82 (noting that in *Milliken v. Bradley*, 418 U.S. 717 (1974), "the actions of a local school board could not be attributed to the State that had created it."); *Bush v. Viterna*, 795 F.2d 1203, 1206 (5th Cir. 1986) (state commission on jail standards could not be held vicariously liable for acts of county officials in maintenance of jails); *cf. Austin Indep. Sch. Dist. v. United States*, 429 U.S. 990, 991, 994 (1976) (Powell, J., concurring) (suggesting that school officials cannot be held liable for racial imbalance in the schools which results from the discriminatory housing practices of other governmental actors); *Bell v. Board of Educ.*, 683 F.2d 963, 968 (6th Cir. 1982) (rejecting the argument that "a school board otherwise innocent of segregative intent is liable for the discriminatory housing practices of other governmental agencies.").

The question would be more difficult if the UDC were an arm or instrumentality of the State, like the SED. As we stated in our previous liability decision:

> It is undisputable that a hypothetical single state agency which controls the operation of, and engages in the racial segregation of, both housing and schools—by confining for racial reasons the city's subsidized housing to one section of the city, while simultaneously adhering to a neighborhood school policy of student assignment—can be held liable for such conduct. It is inconceivable that state action may be fractionalized such that two state agencies could be permitted to collectively engage in precisely the same conduct, yet avoid legal accountability for the identical result.

Yonkers Board, 624 F.Supp. at 1534. However, although created by the State, the UDC is an entity distinct and separate from the State, with substantial operational autonomy. Like a municipality, the UDC is by statute a political subdivision of the State. *See Cine 42nd Street Theater Corp. v. Nederlander Oral. Inc.*, 790 F.2d 1032, 1044, 1047 (2d Cir. 1986). Indeed,

the Second Circuit has already held in this case that "[t]he UDC does not act in a sovereign capacity, and therefore they may not successfully assert the Eleventh Amendment as a defense." *See United States v. Yonkers*, No. 92-6198, slip op. at 3 (2d Cir. Jan. 13, 1993) (citing *Cine 42nd*, 790 F.2d at 1044).

Although the YBE points to cases involving Little Rock, Indianapolis, and Wilmington in which federal courts arguably imputed to state defendants responsibility for school segregation caused in part by the segregative conduct of state-created municipal housing agencies, *see Little Rock Sch. Dist.*, 778 F.2d at 423-27; *Board of Sch. Comm'rs*, 637 F.2d at 1116; *Evans*, 393 F.Supp. at 435, these cases either pre-date *Monell v. Department of Social Servs.*, 436 U.S. 658 (1978) and *City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988) or relate to circumstances in which the state itself historically had fostered a dual school system.[36] They do not support YBE's general assertion that state liability for school segregation may be predicated on acts of local subdivisions.

Further, in declining to impute the actions of the UDC to State education officials, we note that the relationship between these parties differed from the relationship that we found to exist between the City of Yonkers and the YBE in our previous liability decision. In that decision, we found that not only was there evidence of intentionally segregative conduct on the part of local school officials, *see Yonkers Board*, 624 F.Supp. at 1533 (distinguishing the situation in Yonkers from that in Bell), but also that any legal separation between the City and the YBE was "artificial and constitutionally

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[36] *Monell* and *Praprotnik* would preclude the vicarious liability under § 1983 of State education officials for the actions of the UDC. Moreover, at least one court has found that there also can be no vicarious liability under Title VI. *See Hodges v. Public Building Comm'n*, 873 F.Supp. 128, 132 (N.D. Ill. 1995); *cf. Springer v. Seaman*, 821 F.2d 871, 881 (1st Cir. 1987) (finding no case addressing the issue of vicarious liability under Title VI). Although the EEOA appears to provide precisely the type of vicarious liability not otherwise imposed under § 1983 and Title VI, *see supra* pp. 59-61, the EEOA does not apply to the actions of the UDC, but only to the actions of "educational agencies" or the state itself.

insignificant" in light of mayoral appointments to the YBE that furthered common segregative objectives. *See* 624 F.Supp. at 1534-35. Here, there is no evidence of segregative conduct on the part of State education officials; moreover, there is no evidence that these officials and the UDC worked together in any concerted manner in pursuit of a common segregative goal.

Therefore, we must address the YBE's other theory of recovery, based on the actions of the UDC, against State education officials. To what extent does the passive response of the Commissioner, the Board of Regents and other State educational officers to Yonkers school segregation create liability because of the fact that the UDC did not vigorously resist, and indeed acquiesced in, segregative Yonkers housing patterns? In other words, does the State education officials' knowledge[37] of the UDC's participation in site selection for Yonkers housing alter our holding, set forth above, that the conduct of these education officials is not actionable under the standard of *Arthur v. Nyquist*. We hold that it does not.

As noted above, *Arthur* held that state officials cannot be held liable for their mere inaction or failure to combat the segregative acts of local officials. 573 F.2d at 146. Without imputing the actions of the UDC to State education officials, which we have already decided would be inappropriate in this case, we do not see how the education officials' knowledge of the UDC's role in Yonkers housing segregation distinguishes these officials from those in *Arthur*. After all, the fact that State education officials knew of the segregative housing practices of Yonkers officials did not make the conduct of the State officials actionable under the *Arthur* standard. Since the UDC is the legal equivalent of a municipality, like Yonkers, *see supra* pp. 70-71, there is no reason to find that the State education officials' knowledge of UDC involvement in these local housing practices tips the *Arthur* balance in favor of a finding of state liability.

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[37] There is evidence that at least some SED staff knew during the mid-to-late 1970's that Yonkers was planning to build subsidized housing in a way that would enhance segregation. Sobel Deposition at 223.

IV.

Conclusion

We thus conclude that the extensive record compiled herein furnishes no basis for the imposition of liability on any State defendant. We reach this conclusion with reluctance for several reasons.

First, we find entirely unpersuasive the argument of the State that it lacked full knowledge of the nature, cause and extent of the segregation in the Yonkers public schools. For example, not to have been aware of the segregative aspects of special education in Yonkers, *see* 624 F.Supp. at 1453-62; 837 F.2d at 1196-97, despite careful scrutiny of Yonkers special education in general, would have required a careful avoidance of such knowledge.

We find similarly unpersuasive the State's contention that it lacked the power to address adequately the problem of school segregation. There is no doubt in our mind that the State possessed the full means and authority needed to deal with Yonkers school segregation, had it been inclined to do so. We conclude that the State determined not to take any affirmative action to deal with Yonkers school segregation because of political and other pressures, from within the Board of Regents and from without, which opposed vigorous desegregation efforts. These pressures can only be explained in racial terms.

However, we find no basis for imposing liability on the State because we find ourselves constrained by the decisional rule set forth in *Arthur v. Nyquist*. As have we, the court in *Arthur* found that the state had the power and duty to address segregation (there, in Buffalo), but nevertheless held that the absence of affirmative participation by the state in local pro-segregative conduct compelled a finding of no-liability. The teaching of *Arthur* is that abdication by the state in discharge of its duty to cause local districts to desegregate does not afford a basis for liability. Able counsel for the YBE and NAACP advance no claim that *Arthur* does not continue to be an accurate statement of the law in this Circuit which is

binding on this Court. Rather, they contend that they have proven a more direct link between State action and school segregation.

In the end, we conclude that the differences between this case and *Arthur* are quantitative, not qualitative. The extent of the State's determination *not* to act vis-a-vis school desegregation in Yonkers and the consequences of that inaction have been fully documented; but no more has been shown. Accordingly, we conclude that the complaint against all the State defendants must be dismissed.

With respect to housing issues, we have found that the UDC acquiesced in the segregative site selections of Yonkers officials. However, any claims against the UDC and its present director are barred by the statute of limitations. Moreover, the actions of the UDC cannot be imputed to the State or to State education officials. Finally, the State education officials' awareness of the housing situation in Yonkers does not alter our analysis of the liability of these officials under *Arthur v. Nyquist*.

As previously noted by this Court, see *United States v. City of Yonkers*, No. 80 Civ. 6761, 1992 WL 176953, at *1-*2 (S.D.N.Y. July 10, 1992), these conclusions do not leave the YBE and NAACP without a remedy to deal with the vestiges of segregation which the Court has found to exist in Yonkers. The City of Yonkers remains liable to deal with the segregation that it has caused in the Yonkers Public Schools.

The parties are to advise the Court in writing within twenty (20) days from the date hereof as to how and when they wish to proceed with the remaining phases of this litigation.

SO ORDERED.

Dated: March 27, 1995
New York, New York

/s/ LEONARD B. SAND
U.S.D.J.

June 14, 1995
Opinion of the District Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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80 Civ. 6761 (LBS)
June 14, 1995
HONORABLE LEONARD B. SAND, U.S.D.J.

UNITED STATES OF AMERICA,

Plaintiff,

—and—

YONKERS BRANCH, NAACP, et. al.,

Plaintiff-Intervenors,

—against—

CITY OF YONKERS, YONKERS COMMUNITY DEVELOPMENT AGENCY, YONKERS BOARD OF EDUCATION,

Defendants,

—and—

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, SAMUEL PIERCE, SECRETARY,

Added-Defendants,

—and—

THE STATE OF NEW YORK; MARIO CUOMO, as GOVERNOR OF THE STATE OF NEW YORK; THE BOARD OF REGENTS OF THE STATE OF NEW YORK; MARTIN C. BARELL, R. CARLOS CARBALLADA, ADELAIDE L. SANFORD, WILLARD A. GENRICH, EMLYN I. GRIFFITH, JORGE L.

BATTISTA, LORA BRADLEY CHODOS, LOUISE P. MATTEONI, EDWARD MEYER, FLOYD S. LINTON, SALVADORE SCLAFINI, MIMI LEVIN LIEBER, SHIRLEY C. BROWN, NORMA GLUCK, THOMAS FREY and JAMES MCCABE, SR., in their official capacities as members of the State Board of Regents; THE DEPARTMENT OF EDUCATION OF THE STATE OF NEW YORK; THOMAS SOBOL, as COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK; and THE URBAN DEVELOPMENT CORPORATION of the STATE OF NEW YORK and VINCENT TESE, as Director of the Urban Development Corporation,

Added-Defendants.

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OPINION

SAND, J.

In an Opinion dated March 27, 1995, this Court concluded that the State of New York, the State Board of Regents, and various other State education officials (collectively, "the State"), as well as the Urban Development Corporation, were not liable under 42 U.S.C. § 1983 for the conditions of unlawful *de jure* segregation that the Court had previously found to exist in the Yonkers Public School System. *See United States*

v. Yonkers, 880 F.Supp. 212, 236 (S.D.N.Y. 1995). The Court declined to reach the merits of possible State liability under The Equal Educational Opportunities Act of 1974, 20 U.S.C. § 1701 *et seq.* ("EEOA"), a federal statute that had not been included in the original interpleader complaint against the State nor relied upon by plaintiffs as to any questions of substantive liability. *See* 880 F.Supp. at 238 & n.32, 241. The Court indicated, however, that it would revisit the EEOA issue upon any further application of the parties. *Id.* at 241.

Presently before the Court is just such an application. The Yonkers Board of Education and the Yonkers Branch, NAACP (collectively, "plaintiffs") have moved for leave to amend their complaint to state a claim under the EEOA and for a ruling that the State is liable under the EEOA based on the findings made in the March Opinion. Plaintiffs also move the Court to "supplement" the March Opinion by addressing the merits of their claim of State liability under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.* ("Title VI"). The State opposes the motion on the grounds that plaintiffs' requests for relief under the EEOA and Title VI are both procedurally barred and meritless.

Having considered the arguments of the parties, as raised both in the motion papers and at oral argument, the Court concludes that plaintiffs are not entitled to prevail on either their EEOA claim or their Title VI claim. Our reasoning is set forth below. In addition, the Court directs the entry of a final judgment consistent with this Opinion pursuant to Fed. R. Civ. P. 54(b), so that the parties may take an immediate appeal on the issue of State liability.[1]

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[1] This is consistent with the request of the parties as expressed at oral argument on plaintiffs' motion on May 25, 1995.

I. The EEOA

A. The Procedural Propriety of Amending the Complaint

The first question before us is whether to grant plaintiffs leave to amend their complaint to state a claim against the State under the EEOA.[2] The parties agree that post-trial requests to amend the pleadings are governed by the twin standards set forth in *Hillburn v. Maher*, 795 F.2d 252 (2d Cir. 1986), *cert. denied*, 479 U.S. 1046 (1987): if the issue raised by a proposed amendment was tried with the express or implied consent of the parties, the amendment must be permitted; if there was no such consent, the amendment may be permitted if the party against whom it is offered would not be prejudiced by it, and the amendment should be granted in the absence of prejudice if "the interests of justice so require." *Id.* at 264. In this case, the question of prejudice concerns the fact that plaintiffs' EEOA claim rests on a theory of vicarious liability that the State claims it cannot now fairly defend against because it did not participate in the original liability proceedings against the City of Yonkers in 1983-84.

Putting the question of consent-to-litigate to one side, we believe that plaintiffs satisfy the second of the *Hillburn* standards. The issue of prejudice was raised by the State prior to trial in early 1994 when plaintiffs served on the State a number of requests for admissions relating to the Court's November, 1985 Opinion on the liability of the City. *See* Added State and UDC Defendants' Responses to the Yonkers Board of Education's Second Requests for Admissions Relating to the Court's Opinion of Nov. 20, 1985 at 3-4. The Court concluded that concerns of due process did not preclude the requested admissions, and the admissions became part of the record to the extent that the State did not seek to refute them. *See* Order of the Court dated April 7, 1994. We see no reason to upset this resolution of the matter at this point in the litigation. We

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[2] The manner in which the EEOA became an issue in this case is set forth in detail in the March Opinion, 880 F.Supp. at 238-41.

note, however, that if we did perceive prejudice in holding the State to the factual findings concerning the City's liability, we would consider whether to allow the State to reopen the record and contest any of the findings deemed admitted against it.

As for the requirements of the "interests of justice," we think that the public interest in a thorough resolution on the merits of a claim is particularly compelling in civil rights litigation such as this. We accordingly grant plaintiffs' motion to amend the complaint to state a claim under the EEOA.

B. The Merits of the EEOA Claim

Section 1703 of the EEOA provides in relevant part that:

> No State shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by (a) the deliberate segregation by an educational agency of students on the basis of race, color, or national origin among or within schools; (b) the failure of an educational agency which has formerly practiced such deliberate segregation to take affirmative steps . . . to remove the vestiges of a dual school system . . . .

42 U.S.C. § 1703. For purposes of section 1703, an "educational agency" can be a local educational entity such as the Yonkers Board of Education. *See* 20 U.S.C. §§ 1720(a), 2891(12), 3381.

The question before us is whether this provision of the EEOA provides a basis for holding a state vicariously liable for the discriminatory acts of local educational authorities. In the March Opinion, we perceived this question to resolve itself into a choice between following the literal and unambiguous language of section 1703, which seemed to impose on states the type of supervisory liability foreclosed under 42 U.S.C. § 1983, and looking beyond section 1703's language to the legislative history of the EEOA, which strongly suggested that Congress did not intend the statute to afford pro-

tections against racial discrimination beyond those already provided under the Fifth and Fourteenth Amendments of the Constitution.[3]

Further reflection on the matter in light of the subsequent briefing and oral argument by the parties has convinced us of several things. First, it does not appear that we are in fact faced with a clear-cut choice between the language of the statute and its legislative history. For one thing, the literal language of section 1703 is not as unambiguous as we initially thought.[4] For another, the internal incongruity of the EEOA's substantive provisions, while not creating ambiguity *per se*, raises serious doubts about what Congress intended to achieve by passing the EEOA.[5] We now believe that the plain

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[3] *See* 880 F.Supp. at 239-41.

[4] The State argues that the introductory phrase "No State shall" in section 1703 is a term of art denoting the general concept of state action and that its inclusion in section 1703 is simply Congress' way of saying that the proscriptions of that provision are to apply to state, but not to private, actors. Though this reading renders section 1703 slightly redundant in style (since the term "educational agency" in section 1703 is already defined to include only public authorities, be they state or local), it is not for that reason implausible. At the very least it calls into question plaintiffs' contention that the phrase "No State shall" is meant to single out the fifty United States, as opposed to state actors in general, for liability for unlawful segregation in the schools, regardless of its cause.

[5] With the exception of section 1703 and certain other provisions relating to jurisdiction and standing to bring suit, the entire statute is devoted to disciplining and limiting the ways in which federal courts may proceed in remedying unlawful school segregation and to identifying and emphasizing those actions and conditions which *do not* constitute denials of equal educational opportunity. Furthermore, Congress' sole expressed purpose in passing the EEOA—to "specify appropriate remedies for the orderly removal of the vestiges of the dual school system," 20 U.S.C. § 1701(b)—has nothing to do with articulating standards of liability for segregation in the first instance, much less with articulating standards that depart from well-established constitutional norms. Though plaintiffs insist there is nothing inherently inconsistent in Congress' deterring certain types of school desegregation efforts by federal courts and agencies on the one hand, and Congress' burdening the states with new, affir-

language and structure of the EEOA prompt enough questions concerning Congress' purpose in enacting section 1703 as would justify recourse to the EEOA's legislative history. *See Lewis v. Grinker*, 965 F.2d 1206, 1215 (2d Cir. 1992) (noting that it is particularly appropriate to look beyond the literal meaning of statutory language when the statute "produces an unexpected result and when there is strong reason to doubt that Congress intended that result"). And, as even plaintiffs appear to concede, the legislative history supports the State's position more than their own.[6]

More important still, however, is our recognition that the relevance of the EEOA to this case does not turn in the first instance on whether section 1703 was intended to provide a basis for vicarious state liability in desegregation cases. Rather, assuming *arguendo* that it was so intended, the key question is whether the State can be forced to participate in a remedial scheme that is now ten years old and that was neither devised nor implemented with the prescriptions and priorities of the EEOA in mind.

As several courts have recognized, the EEOA does not so much purport to limit the ultimate remedial powers of the courts in desegregation cases as it tries to ensure that courts impose certain vigorous remedies (such as the compulsory transportation of students) only as a last resort, after due and explicit consideration of more moderate alternatives. *See, e.g., Morgan v. Kerrigan*, 530 F.2d 401, 412-13 (1st Cir.), *cert. denied*, 426 U.S. 935 (1976). For example, section 1713 of the EEOA lists and prioritizes a set of remedial options that a court must consider and make specific findings upon *before*

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mative duties of discrimination prevention on the other hand, we think the tension between these aims is clear.

[6] *See* Plaintiffs' Reply Memorandum in Support of the Yonkers Branch, NAACP's and the Yonkers Board of Education's Motion for Leave to Amend Pleadings and for Supplementation of the Court's Opinion of March 27, 1995 at 22-23; Yonkers Board of Education's Supplemental Brief in Response to the Court's Order of February 28, 1995 on the Equal Education Opportunities Act at 5.

it proceeds to formulate a remedy that "involve[s] directly or indirectly the transportation of students . . . ." 20 U.S.C. § 1713. Similarly, section 1755 of the EEOA provides that no court may order the implementation of any plan to remedy a finding of *de jure* segregation which involves the transportation of students *unless* it first finds that "all alternative remedies are inadequate." 20 U.S.C. § 1755.

The remedial plan that was devised ten years ago for the Yonkers school system, to which the State would become a party if found liable at this stage of the proceedings, utilizes, albeit to a minimal degree, mandatory busing. Although at the time it was the working assumption of both the Yonkers Board of Education and the Court that mandatory busing was necessary to the achievement of a constitutionally-adequate remedy for Yonkers, the Court never made (nor was requested to make) specific findings regarding the efficacy of remedies other than busing.

We do not think it would be consistent with Congress' intent in adopting the EEOA to require the State to participate in a remedial plan that does not comport with the requirements of a statute applied retroactively to it. Nor do we think it would be sound, from any perspective, to reopen at this late stage in these proceedings questions relating to the proper scope of a remedial plan adopted and implemented a decade ago. Regardless of whether the State can be held vicariously liable as a matter of law under section 1703 of the EEOA, we conclude that it cannot lawfully be made to participate in the remedial plan now in place in Yonkers. The State therefore cannot be held accountable under the EEOA in this case.[7]

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[7] Section 1716 of the EEOA, which provides that a desegregation plan need not comply with the standards set forth in the EEOA as long as the plan is voluntarily proposed by the "appropriate educational agency," does not disturb our holding. "Voluntary," to our mind, means a willingness to do something in light of all the material facts bearing upon the particular decision. Because the Court's obligations under the EEOA were not an issue in the initial liability and remedy proceedings involving the City of Yonkers ten years ago, we cannot conclude that the Yonkers Board of Education "voluntarily proposed" the remedial plan

II. Title VI

A. The Procedural Propriety of Supplementation

Plaintiffs ask us to "supplement" the March Opinion by including a decision on the merits of their Title VI claim. We see no reason to deny the request. The Title VI claim is one that plaintiffs pleaded early on, including it in their complaint against the State. The claim was not addressed on its merits in the March Opinion, not because it was not procedurally before the Court, but because it was not the subject of focused attention by the parties. The procedural bars that the State raises against supplementation—Rule 59(e), Fed. R. Civ. P., and Local Rule 3(j)—are not relevant. The 10-day time limit of Rule 59(e) begins to run only upon "entry of the judgment"; and the March Opinion, which among other things invited the parties to make further application to the Court within 20 days of its issuance, *see* 880 F.Supp. at 217, 245, does not constitute a "judgment." *See* Fed. R. Civ. P. 58. Local Rule 3(j) applies by its express terms only to a court's determination of an original "motion," not to judicial findings of fact and conclusions of law following a bench trial. We will accordingly proceed to address the merits of plaintiffs' Title VI claim against the State.

B. The Merits of the Title VI Claim

Title VI provides that:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

42 U.S.C. § 2000d.

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now in place when in good faith it designed a set of desegregation steps that incorporated mandatory busing in response to the Court's orders.

Plaintiffs argue that when read in light of its language, purpose, legislative history, and implementing regulations, Title VI provides a basis for holding the State liable for its failure to prevent the unlawful conditions of racial segregation in the Yonkers schools. In particular, plaintiffs argue that when a recipient of federal funds (such as the State of New York) distributes the funds or otherwise arranges for them to flow to some other agency (such as the Yonkers Board of Education), the recipient assumes an affirmative obligation to ensure that the agency complies with the dictates of Title VI and uses those funds in a non-discriminatory manner. On this argument, Title VI does not merely require a recipient of federal funds to refrain from doing wrong itself; it requires a recipient to actively restrain the wrongdoing of those entities or agents to whom it conveys the use of federal monies.

We would begin by noting that there is nothing implausible in this reading of Title VI as such. Title VI was enacted as Spending Clause legislation, which means that it rests on the power of Congress to set the terms on which federal financial assistance will be made available to state and local governments and private actors. *Guardians Ass'n v. Civil Serv. Comm'n of New York*, 463 U.S. 582, 598-99 (1983) (White, J. joined by Rehnquist, J.). Surely one option that Congress might have wished to extend to potential state recipients was that of policing the local uses of federal funds in exchange for receiving the funds in the first instance and enjoying some discretion in distributing them.

That said, we must recognize plaintiffs' construction of Title VI for what it is—an argument that the statute imposes on states liability for failing to ensure that local governments receiving federal flow-through funds do not discriminate on the basis of race. Although this supposed liability is not "vicarious" in the strictest sense (since it is based on a duty that is separate and distinct from the primary duty not to discriminate), it would clearly render a state legally responsible for racial discrimination that the state itself did not intentionally contribute to or cause.

The question before us is whether Title VI imposes this type of "quasi-vicarious" liability. The most relevant authority on this point is *Guardians Ass'n v. Civil Serv. Comm'n of New York*, 463 U.S. 582 (1983). In *Guardians*, a majority of the Court reaffirmed the conclusion of *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 287, 328, 352 (1978), that liability under Title VI is coextensive with liability under the Equal Protection Clause of the Fourteenth Amendment. *See Guardians*, 463 U.S. at 610-11 (Part II of concurring opinion of Powell, Rehnquist, JJ., and Burger, C.J.); *id.* at 612 (O'Connor, J., concurring in the judgment); *id.* at 639-42 (Stevens, Brennan, and Blackmun, JJ., dissenting). "In view of the clear legislative intent," the *Bakke* majority had written, "Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment." *Bakke*, 438 U.S. at 287 (opinion of Powell, J.). *See also United States v. Fordice*, 112 S.Ct. 2727, 2737 n.7 (1992) (more recently stating that Title VI's protections extend no further than the Fourteenth Amendment). We therefore must look to constitutional standards to determine the reach of Title VI in this case.

It is well-established that the Equal Protection Clause prohibits only intentional or purposeful discrimination. *Washington v. Davis*, 426 U.S. 229, 238-42 (1976); *Keyes v. School Dist. No. 1*, 413 U.S. 189, 205, 208, 212-13 (1973) (finding, in the schools context, that only *de jure* segregation, or "a current condition of segregation resulting from intentional state action," was constitutionally impermissible and the proper predicate for enforced remedial action). This means that the discriminatory effect of a law or a condition of segregation offends the Constitution only if it can be said to result from a discriminatory state purpose. *Washington*, 426 U.S. at 240.

In this case, acts of intentional racial discrimination have undoubtedly been found, but they have been found only on the part of local Yonkers officials, not on the part of the State defendants. *See* 880 F.Supp. at 236, 245. This is important,

because the discriminatory state purpose that must exist before a violation of the Equal Protection Clause can be found is a form of intent, and intent—be it measured by a subjective standard, an objective standard, or a blend of the two—inheres in actors, not in situations or conditions. In our view, a state no more "intentionally" fosters racial segregation by failing to prevent local acts of intentional segregation than it "intentionally" fosters racial segregation by failing to alter adventitious housing patterns—in other words, it does not unconstitutionally discriminate in either instance. *See Hart v. Community School Board*, 512 F.2d 37, 47-51 (2d Cir. 1975) (explicating the intent-to-discriminate requirement under the Constitution and assuming that "mere inaction, without any affirmative action by the school authorities, allowing a racially imbalanced school to continue, would amount only to *de facto* rather than *de jure* segregation"); *Arthur v. Nyquist*, 573 F.2d 134, 143 (2d Cir.) (concluding that the test for discriminatory intent fashioned in *Hart* remains valid in the wake of the Supreme Court's decision in *Washington v. Davis*), *cert. denied*, 439 U.S. 860 (1978).[8]

Because a state's failure to prevent local acts of segregation, without more, does not offend the Constitution, we conclude, on the authority of *Bakke* and *Guardians*, that the

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[8] Our conclusion draws heavily on our inquiry in the March Opinion into the scope of the State's liability under 42 U.S.C. § 1983. And for good reason. Although we recognize that section 1983 is in some ways a "peculiar" statute, in that it contains a state action requirement and a requirement that the tort-feasor be a "person," we see little basis for concluding that it contains a standard of discriminatory intent different from the standard enunciated in the cases interpreting the Constitution directly, such as *Washington* and *Keyes*. Certainly *Arthur v. Nyquist*, the Second Circuit case interpreting the Constitution's discriminatory-intent requirement through the prism of section 1983, did not indicate that there was any difference in the standards. Nor do we readily see how a state actor could be found not to have "subject[ed], or caus[ed] to be subjected" a complainant to racial discrimination (the test under section 1983) and yet at the same time be found to have undertaken action with an intent to produce a condition of racial segregation (the test under *Washington* and *Keyes*).

State's conduct vis-a-vis the Yonkers public schools does not offend Title VI. We accordingly reject plaintiffs' argument that the language, purpose, and legislative history of Title VI compel a finding of State liability under that statute.

Still to be considered are the implications of the Title VI regulations. For although one majority of the *Guardians* Court accepted the principle that Title VI reaches no further than the Constitution in terms of the protections it affords, another majority of the *Guardians* Court was persuaded that Title VI permits the enactment of implementing regulations that do go beyond the Constitution. *See Guardians*, 463 U.S. at 591-93 (White, J.); *id.* at 617-24 (Marshall, J., dissenting); *id.* at 642-45 (Stevens, Brennan, and Blackmun, JJ., dissenting). Specifically, a majority of the Justices in *Guardians* held that although Title VI itself does not prohibit the use of federal funds in programs that have a disparate impact on racial minorities, administrative regulations passed pursuant to Title VI could legitimately incorporate an "impact" or "effects" standard. The question before us would thus seem to be whether Title VI's implementing regulations provide a basis for holding a state recipient of federal financial assistance liable for the racially discriminatory acts of local subrecipients

We hold that they do not, for several reasons. The first has to do with the manner in which plaintiffs have presented the question to the Court. Plaintiffs ask us to read Title VI in light of its implementing regulations. That is, they ask us to use the regulations as a tool of interpretation, furnishing a perspective with which one is to read Title VI in order to ascertain its true meaning.[9] Consistently with this approach, plaintiffs have

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[9] Title VI's regulations, say plaintiffs, "represent 'early interpretations of the statute by the agencies charged with enforcement,' [and] should be accepted as embodying a proper reading of Title VI 'absent clear inconsistency with the face or structure of the statute, or with the unmistakable mandate of the legislative history.' " Plaintiffs' Memorandum in Support of the Yonkers Branch, NAACP's and the Yonkers Board of Education's Motion for Leave to Amend Pleadings and for Supplementation of the Court's Opinion of March 27, 1995 at 29 (quoting

never alleged any claim under the Title VI regulations *per se*. Rather, they continue to invoke only the statute itself.

The problem is that it is unclear whether the type of interpretive inquiry urged by plaintiffs is open to us. The majority of the *Guardians* court that agreed to look to Title VI's regulations for guidance on the disparate-impact issue failed to make clear whether they believed the regulations were of the "interpretive" variety (*i.e.*, regulations that merely inform a court's interpretation of a statute), or of the "legislative" variety (*i.e.*, regulations that are passed by agencies pursuant to delegated law-making authority and that have the force of law binding upon the courts). *See generally National Latino Media Coalition v. F.C.C.*, 816 F.2d 785, 787-88 (D.C. Cir. 1987) (analyzing the differences between the two types of agency regulations).[10] The distinction matters in the follow-

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Guardians, 463 U.S. at 592 (White, J.)). *See also* Plaintiffs' Letter to the Court Dated May 22, 1995 at 1 ("We submit that . . . the Title VI implementing regulations should be considered and deferred to in interpreting Title VI, absent a clear conflict with the statutory language . . . .).

[10] Some of the members of the *Guardians* majority that relied on the Title VI regulations used language and argued from standards that are more characteristic of interpretative regulations than of legislative regulations. For example, both Justices White and Marshall framed the issue in terms of deferring to the construction of Title VI as contained in its regulations. Both focused on the timing and consistency of the agencies' position that Title VI prohibited disparate impact, as well as on the expertise of the administrators involved in fashioning the regulations. See *Guardians*, 463 U.S. at 592-93 (White, J.); *id.* at 618-23 (Marshall, J., dissenting). As the Supreme Court has recognized, timing, consistency, and agency expertise are all factors that courts traditionally consider in judging the authoritativeness of interpretative regulations. *See Batterton v. Francis*, 432 U.S. 416, 424-25 & n.9 (1977).

Justices Stevens, Brennan, and Blackmun, on the other hand, focused on Congress' delegation of law-making power to the agencies charged with the distribution of federal financial aid, and they invoked the "reasonable relation test" set forth in *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 369 (1973), which is used to assess the validity of legislative regulations. *See Guardians*, 463 U.S. at 643 (Stevens, Brennan, and Blackmun, JJ., dissenting). Justice O'Connor, although of

ing sense: if the *Guardians* majority understood the Title VI regulations to be interpretive, we could accept plaintiffs' invitation to read Title VI through its regulations and determine whether the statute, as glossed, provides for an outcome not required by the statute alone. If, however, the *Guardians* majority understood the regulations to be legislative, we would regard the regulations as law, related to but independent of the statute, and we would look to the regulations themselves to decide the issue before us. Yet here a further difficulty arises because, as noted above, plaintiffs have not pleaded the regulations as an independent cause of action.

All of this uncertainty is arguably enough to deny plaintiffs' motion. However, even if we were to assume that we can treat Title VI's implementing regulations as interpretive, and revisit Title VI's meaning through their prism, we do not believe that the regulations provide a concrete enough basis for holding the State liable for the racial discrimination in the Yonkers schools.

To begin with, the Title VI regulations are not nearly as specific on the issue of vicarious liability as they are on the issue of disparate impact. For example, 34 C.F.R. § 100.3(b)(2) (Department of Education), one of regulations at issue in *Guardians*, addresses the question of disparate impact in the following straightforward manner:

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the view that the Title VI regulations could not reach beyond the statute itself, nonetheless assumed that the regulations were legislative in nature. *See id.*, 463 U.S. at 613-15 (O'Connor, J., concurring in the judgment).

There are suggestions in cases decided after *Guardians* that Title VI's implementing regulations are legislative in nature, and that a party must rely on those regulations independently of the statute itself. *See, e.g.*, *Alexander v. Choate*, 469 U.S. 287, 293 (1985) (noting that *Guardians* held that "actions having an unjustifiable disparate impact on minorities could be redressed through agency regulations designed to implement the purposes of Title VI"); *Association of Mexican-American Educ. v. California*, 836 F.Supp. 1534, 1546-48 (N.D. Cal. 1993) (following *Guardians* and considering whether there is a private right of action under the Title VI regulations incorporating a disparate impact standard).

> A recipient, in determining the types of services, financial aid, or other benefits, or facilities which will be provided under any such program, or the class of individuals to whom, or the situations in which, such services, financial aid, other benefits, or facilities will be provided under any such program . . . *may not*, directly or through contractual or other arrangements, utilize criteria or methods of administration *which have the effect* of subjecting individuals to discrimination because of their race, color, or national origin, or *have the effect* of defeating or substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, color, or national origin.

(emphases added). In contrast, the regulations cited by plaintiffs as a basis for imposing vicarious state liability provide, in pertinent part:

> A recipient under any program to which this subpart applies may not, directly or through contractual or other arrangements, on ground of race, color, or national origin [,] [discriminate in the administration of the services, financial aid, or benefits provided under the program].

34 C.F.R. § 100.3(b)(1) (Department of Education).

> The term "program" includes any program, project, or activity for the provision of services, financial aid, or other benefits to individuals (including education or training, rehabilitation, housing, or other services, whether provided through employees of the recipient of Federal financial assistance or provided by others through contracts or other arrangements with the recipient . . .) . . . .

34 C.F.R. § 100.13(g) (Department of Education). We agree with plaintiffs that the most natural reading of these latter two regulations is that they forbid recipients of federal financial assistance from discriminating indirectly, through third parties, as well as directly by their own hand. But indirect

discrimination is not necessarily the same thing as vicarious or quasi-vicarious discrimination. If it were, it would be difficult to understand the many cases interpreting section 1983 (under which there is no vicarious liability) which hold that a state actor may subject a person to a violation of his rights by creating a custom or policy under which third parties commit unconstitutional acts. *See, e.g., Williams v. Smith*, 781 F.2d 319, 323 (2d Cir. 1986).

Plaintiffs also rely on a set of Title VI regulations that require the states to be administratively involved in monitoring the use of federal funds. For example, both 28 C.F.R. § 42.105(d) (Department of Justice) and 34 C.F.R. § 100.4(b) (Department of Education) require state recipients of continuing federal financial assistance to give assurances that programs receiving assistance are conducted in a nondiscriminatory manner, and to provide for such methods of administration of the programs as to assure federal authorities that the state recipient and its subrecipients are complying with Title VI. Another regulation, 34 C.F.R. Part 100, Appendix B(II)(B) (Department of Education), requires that the state agency responsible for the administration of vocational education programs adopt a compliance program to prevent, identify, and remedy racial discrimination on the part of its subrecipients. Among other things, this compliance program must include periodic reviews of selected subrecipients. Upon a finding of unlawful discrimination, the state agency must notify the subrecipient of steps it needs to take to get into compliance with Title VI, and the state agency must attempt to obtain voluntary compliance.

There is no denying that regulations such as these indicate a determination on the part of federal authorities to get states involved in the policing of federal funds. But in our view, state-level oversight responsibilities in and of themselves can serve purposes—such as administrative efficiency—having little to do with a concern to apportion ultimate legal responsibility for violations of Title VI. We recognize that the implementing regulations as a whole, and the regulations

establishing procedures for investigating and sanctioning Title VI violations, in particular, seem more concerned with the bare fact of a violation of Title VI than with the identity of the violator as such. *See, e.g.*, 34 C.F.R. § 100.8(a) (Department of Education) (noting simply that "[i]f there appears to be a failure or threatened failure to comply with this regulation, and if the non-compliance or threatened noncompliance cannot be corrected by informal means, compliance . . . may be effected by the suspension or termination of . . . Federal financial assistance or by any other means authorized by law"). We believe, however, that if the Title VI regulations are to reach beyond Title VI itself, as *Guardians* says they may, they must do so by way of something more definite than what can be gleaned through suggestion and inference.

In sum, because it is unclear how we are to take cognizance of the Title VI regulations, because one of those ways is foreclosed by the posture of plaintiffs' pleadings, and because we do not find the regulations definite enough to impose vicarious liability, we deny plaintiffs' Title VI claim against the State.

Conclusion

For the foregoing reasons, plaintiffs' motion for a ruling that the State is liable under the EEOA and/or Title VI is denied. The Court finds that there is no just reason to delay entry of a final judgment on plaintiffs' claims against the State, and accordingly directs the entry of a final judgment dismissing all claims against the State defendants pursuant to Fed. R. Civ. P. 54(b).[11]

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[11] The alternative to entry of a Rule 54(b) order would be to compel plaintiffs to proceed with the remedy phase of these proceedings against the City of Yonkers itself. Prior holdings of this Court have already established that the City is liable and that vestiges of segregation remain in the Yonkers public school system. *See* 880 F.Supp. at 245. Plaintiffs have disclaimed any interest in proceeding at this time solely against the City and this Court will defer to that preference, which of

SO ORDERED.

Dated: June 14, 1995
New York, New York

/s/ LEONARD B. SAND
Leonard B. Sand
U.S.D.J.

course involves political and economic ramifications which the parties are better able than the Court to assess.

August 30, 1993
Opinion of the District Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X
UNITED STATES OF AMERICA,

Plaintiff,

and

YONKERS BRANCH, NAACP, et al.,

Plaintiff-Intervenors,

-against- 80 CIV. 6761 (LBS)

CITY OF YONKERS, YONKERS COMMUNITY DEVELOPMENT AGENCY, YONKERS BOARD OF EDUCATION,

Defendants,

and OPINION

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, SAMUEL PIERCE, SECRETARY,

Added-Defendants,

and

THE STATE OF NEW YORK; MARIO CUOMO, AS GOVERNOR OF THE STATE OF NEW YORK; THE BOARD OF REGENTS OF THE STATE OF NEW YORK; MARTIN C. BARELL, R. CARLOS CARBALLADA,

ADELAIDE L. SANFORD, WILLARD A. GENRICH, EMLYN I. GRIFFITH, JORGE L. BATTISTA, LORA BRADLEY CHODOS, LOUISE P. MATTEONI, EDWARD MEYER, FLOYD S. LINTON, SALVADORE SCLAFINI, MIMI LEVIN LIEBER, SHIRLEY C. BROWN, NORMA GLUCK, THOMAS FREY and JAMES McCABE, SR., in their official capacities as members of the State Board of Regents; THE DEPARTMENT OF EDUCATION OF THE STATE OF NEW YORK; THOMAS SOBOL, as COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK; and THE URBAN DEVELOPMENT CORPORATION of the STATE OF NEW YORK and VINCENT TESE, as Director of the Urban Development Corporation,

Added-Defendants.

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APPEARANCES: (See Following Page) August 30, 1993

HONORABLE LEONARD B. SAND, U.S.D.J.

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SAND, J.

As a result of good faith and zealous implementation by the Yonkers Board of Education ("YBE") and its staff of this Court's initial School Remedy Order of May 13, 1986 (Educational Improvement Plan ("EIP") I), the racial separation of students in

the Yonkers Public Schools, which had existed for decades, ended. As the YBE correctly states, "Within less than a year of the issuance of EIP I, the Yonkers Board achieved desegregation of enrollments among the schools; something that many other school districts have taken years or even decades to accomplish." YBE, Post-Trial Brief, p.2. This achievement was brought about by instituting a voluntary magnet school program, including procedures for school selection by parents, busing and other similar measures. The transition took place in a relatively smooth and peaceful manner, without the disturbances and disruption which plagued desegregating school districts elsewhere in this country. What makes this accomplishment even more remarkable is that it took place despite the fact that during the years in question, Yonkers was engaged in a bitter and devisive effort to thwart this Court's orders to remedy, to some degree, the racial discrimination with respect to housing which has existed in Yonkers for well over 40 years.

The YBE, joined in this proceeding by plaintiff-intervenors, the Yonkers Branch, National Association for the Advancement of Colored People ("NAACP"), takes the position that the placement of majority and minority students and staff in the same school buildings in numbers proximate to their incidence in the general school population, so that schools are no longer racially identifiable, is but the first step to achieving a truly unitary school system. Such a unitary school system is in place only when students, regardless of race, have similar educational opportunities and experiences.

The YBE and NAACP contend that vestiges of segregation remain in the Yonkers Public School system which, although capable of being remedied or eradicated, are not being adequately addressed. As a consequence, it is urged that the Yonkers Public School system (sometimes "YPS") continues to discriminate against blacks and hispanics and that dissatisfaction with the existing system, on the part of both minority and

majority parents, threatens to negate or diminish the accomplishments thus far achieved.

The YBE and NAACP further assert that the failure to address adequately these vestiges of segregation results, not from a lack of commitment on the part of the Superintendent of Schools or his staff, but from a lack of funds. The YBE has promulgated a detailed and extensive program (EIP II) in which it sets forth the steps which it believes should be appropriately taken to eradicate vestiges of segregation. Believing that City resources were inadequate to meet the perceived needs[1] and that the State of New York shared a liability with the City for the presence of these vestiges of segregation, the YBE instituted these proceedings against the State which had not heretofore been a party to this protracted litigation. The YBE, joined by the NAACP, seeks to impose upon the State a fiscal responsibility, shared with the City, to fund EIP II.

Scope of Issue

In prior proceedings, the State has moved to dismiss, and sought summary judgment on a number of grounds, including sovereign immunity, statute of limitations and laches. These motions have been denied. See, United States v. YBE, 893 F.2d 498 (2d Cir. 1990) (appeal dismissed).

The YBE had alleged the existence of seven vestiges of segregation:

> (1) the level of minority achievement; (2) the self-esteem and attitudes of students toward education and the educational process; (3) the relationships between majority

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[1] Yonkers is one of the four largest cities in New York State in which the School Board lacks the ability to raise funds through taxation but is dependent entirely on an allocation of funds from the general City budget.

and minority students; (4) the attitudes and effectiveness of teachers and administrators in educating majority and minority students in integrated schools and classrooms; (5) the continuing need for adjustments in curriculum and progress to facilitate quality education in integrated environments under the existing desegregation remedy; (6) the continued disparities in the quality of school facilities and resources; and (7) community perceptions concerning the Yonkers schools and the quality of education under the current desegregation plan.

The position taken by the City of Yonkers in these proceedings has been somewhat blurred. The City in the first instance denies that vestiges of segregation exist in the Yonkers Public Schools, but if such vestiges exist, the City alternatively argues (as federal procedure permits it to do), that the State, not the City, should pay the costs of their education.

In our Opinion of July 10, 1992, denying the motions of the Added State and UDC Defendants ("State Defendants")[2] we concluded that we could not, despite the YBE and State Defendants' proffer of conflicting expert testimony, "definitively determine on this motion whether such vestiges remain in the Yonkers school system".

"Further," we wrote, "we believe that this is a sufficiently discrete issue from the questions of State related causation, liability, and relative responsibility to make bifurcation of this issue feasible". Opinion, July 10, 1992.

Accordingly we advised: "the Court will proceed to determine, after a trial on the merits, the question whether

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[2] For convenience, we refer to all defendants as the "State" for purposes of this stage of the proceedings.

inadequately addressed vestiges of segregation remain in the Yonkers school system. This question has three components: (1) what vestiges, if any, exist; (2) what steps are presently being taken to address such vestiges, if any are found to exist; (3) the adequacy of (2) and availability of more effective measures. All other issues will be deferred for later consideration."

The Court also stated that "we put all parties on notice that if vestiges of segregation are found to exist and to be inadequately addressed, the Court will consider what action is appropriate and will not be limited to the relief sought by the YBE and NAACP against the State. If no vestiges exist, this litigation against the State will, of course, be dismissed."

The scope of this initial phase of these proceedings was further clarified in a telephone conference with counsel for all parties held on May 25, 1993. The City in its Post-Trial brief, p.2., correctly summarizes the conclusion reached at that conference as follows: "Thus, the issues presently before the Court do not include an evaluation of any specific, proposed additional remedy, or an assessment of how any such remedies might be funded. The issues instead are limited to the question of whether vestiges of prior segregation continue to exist in the Yonkers school system and the extent to which such vestiges are presently being addressed."

The Court, having heard twelve days of testimony, shall now proceed to address the specific questions set forth in our July 10, 1992 opinion.

What is a Vestige of Segregation?

The YBE asserts that the testimony adduced at the hearing proves: "numerous related discriminatory conditions or vestiges of prior de jure segregation and inequalities that continue to exist in the Yonkers Public Schools, including the following:

(1) Within many schools in Yonkers, there remains racial and ethnic segregation of students among various levels of courses, programs, classes, and in-class groupings, which affects the quality and type of education provided to children of different racial and ethnic groups;

(2) The implementation of EIP I has not addressed or alleviated many of the conditions of inequality that were fostered by the racially dual system of education in Yonkers, such as racially disparate attitudes and expectations of teachers and administrators; teaching methods that support effective instruction primary for middle or upper middle class white students in homogeneous classrooms; curriculum that is neither multicultural nor aligned to the goals and objectives of the desegregating school system; and a lack of adequate services for students with limited English proficiency, and other pupil personnel services, that are particularly important to the effective education of minority children;

(3) The implementation of EIP I itself has given rise to a number of problems that must be addressed to ensure effective education in a desegregated setting, such as the increased difficulty of obtaining parental involvement in schools that, by necessity, no longer serve populations drawn exclusively from surrounding, segregated neighborhoods;

(4) Although EIP I has been successful to date in maintaining desegregated school enrollments, its ability to support continued voluntary desegregative movement of students within Yonkers and its ability to attract enough middle class and non-minority students to provide for meaningful desegregation in

the future will be seriously undermined unless the magnet school programs are fully implemented and the overall quality of education in the system is improved; and

(5) There continue to exist extremely high levels of as yet unremedied residential segregation in Yonkers, which require the Yonkers Board not only to maintain EIP I but also to offset to the extent practicable the negative effects that flow from the fact that a substantial portion of minority students in Yonkers live in highly segregated, publicly assisted or other housing in the Southwest quadrant of the City.

YBE Post-Trial brief pp 3-4. Before addressing the question whether "vestiges of segregation" exist in the Yonkers Public Schools, one must of course begin with some working definition of that term.

Although the Supreme Court has not explicitly stated what the term "vestige" encompasses, the line of cases beginning with Brown v. Board of Education of Topeka, 347 U.S. 483 (1954) and continuing through the recent decision of Freeman v. Pitts, 112 S. Ct. 1430 (1992) suggests the following definition. A vestige of segregation is a policy or practice which is traceable to the prior de jure system of segregation and which continues to have discriminatory effects. A vestige is not the lingering effect or consequence of segregation, such as poor relations between majority and minority students, but such an effect or consequence may be evidence that a vestige of segregation exists. The duty of the courts and the school boards is to eliminate vestiges of past discrimination "to the extent practicable." Board of Education of Oklahoma City v. Dowell, 111 S. Ct. 630 (1991). Any remaining segregative or discriminatory aspects of the school system must be eliminated "root and branch" Green v. County Board of New Kent County, 391 U.S. 430, 438 (1968).

In United States v. Fordice, 112 S. Ct. 2727, 2735-36 (1992), the Supreme Court elaborated on the concept of a vestige of segregation in the context of desegregating state-run institutions of higher learning. The Court explained:

> Our decisions establish that a State does not discharge its constitutional obligations until it eradicates policies and practices traceable to its prior de jure dual system that continue to foster segregation . . . [the task is to examine] a wide range of factors to determine whether the State has perpetuated its formerly de jure segregation in any facet of its institutional system . . . If policies traceable to the de jure system are still in force and have discriminatory effects, those policies too must be reformed to the extent practicable and consistent with sound educational policies.

In Freeman, the Court emphasized the relationship that must exist between an alleged vestige and the original constitutional violation. The Court stated,

> The vestiges of segregation that are the concern of the law in a school case may be subtle and intangible but nonetheless they must be so real that they have a causal link to the de jure violation being remedied.

112 S. Ct. at 1448.

There is no exclusive list of factors which a district court may examine to determine if there are vestiges of segregation. However, the courts have accepted the "Green factors," named after the decision in Green v. County School Board, 391 U.S. 430, 435 (1967) as a starting point. In Green, the Court suggested that vestiges of segregation can extend "not just to the composition of student bodies . . . but to every facet of school operations–faculty, staff, transportation, extra-curricular activities and facilities."

In Keyes v. School District No. 1, Denver, Colorado, 413 U.S. 189, 196 (1973), the Court identified "community and administration attitudes toward the school" as elements of segregation. In Freeman, the Court approved the district court's consideration of differences in the quality of education afforded to the students, as measured by the achievements of minority students, as an acceptable inquiry into the existence of vestiges.

Justice Marshall, in dissent in Dowling, provided a more philosophical approach to defining "vestige," which, although not as useful in directly identifying an instance of a vestige, is helpful in focusing the inquiry. He wrote, at 111 S. Ct. 644:

> Although the Court has never explicitly defined what constitutes a "vestige" of State enforced segregation, the function that this concept has performed in our jurisprudence suggests that it extends to any condition that is likely to convey the message of inferiority implicit in a policy of segregation.

The line between a "vestige" of segregation and ongoing discriminatory conduct is not clearly drawn. It may well be that the difference between a "vestige" and a current discrimination may relate solely to the historical fact that prior discrimination has been found to exist, or the vigor with which school administrators, intentionally or not, have addressed or condoned discriminatory conditions. As the State asserts in its Post-Trail Brief, p.6:

> "Of course, regardless of whether a school district has been found liable for de jure segregation, it may nonetheless be engaged in current discriminatory conduct which deprives minority students of their constitutional rights. Such conduct is not a "vestige" of a past condition; it is an ongoing constitutional wrong which may be judicially addressed."

Although the distinction between on-going discriminatory conduct and a "vestige" may be of significance with regard to other questions relevant to State liability and remedy, if minority students attending Yonkers Public Schools suffer a constitutional injury, the level affixed to the cause of such injury is of no moment in determining in this phase of the case whether some corrective action is needed.

Burden of Proof

The YBE cites in its Post-Trial Brief, p. 17, language in Fordice to the effect that once State officials have been shown to have contributed to unconstitutional segregation, "the burden of proof falls on the State, and not on the aggrieved plaintiffs, to establish that it has dismantled its prior de jure segregated system." 112 S. Ct. at 2741; accord id. At 2743-44. (O'Connor J., concurring). Thus the YBE asserts, that when it returns to court, as it has, to seek additional desegregation relief, the burden of proof rests on the defendants to show that any current segregation or discriminatory conditions are not in fact casually related to the prior dual system.

We note, however, that although fully applicable to the City, which was a party to the liability and remedy phases of this case, the extent to which these observations are pertinent to the State, newly joined to this litigation, is more problematic. Further, our primary inquiry at this phase is to determine whether discriminatory conditions exist in the Yonkers public schools. Questions of causation have been deferred.

Achievement Levels

Although as noted supra at p. 3, 5, the YBE has cited numerous examples of alleged vestiges, some of these may be thought of as "lingering effects" of segregation rather than as a continuing discriminatory condition. The phenomenon principally

relied upon by the YBE and NAACP at trial, and which this Court deems to be of paramount importance, is the disparity which exists between majority and minority students with regard to achievement levels on standard reading and math tests. After all, the primary function of a school system is to teach, and if evidence discloses that children are not learning at acceptable levels, all else pales in significance.

We begin our analysis with two basic premises. The first, that all children can learn and no children should fail, is not disputed. Indeed, it is the guiding principle propounded by the New York State Education Department. A New Compact for Learning, Improving Public Elementary, Middle and Secondary Education Results in the 1990's, July 15, 1991, passim.

The second basic premise is that one looks to achievement results on standardized tests to determine whether equality of educational opportunity has been achieved. The City challenges this second premise on two grounds.

First, the City asserts (Post-Trial Brief, pp 5-6) that "the constitutional test is whether students have equal access, not whether such equality of access produces consistently equal outcomes". In other words, the City advances the proposition that, so long as majority and minority students are exposed to equal educational opportunities, the constitutional obligation is discharged even if the teaching techniques and curriculum are unsuited to the special needs of some students. But if the schools do not adequately address the needs of some of their students, it is difficult to understand how those students can be said to have had an equal educational opportunity. If, for example, all students were taught in a foreign language, which only some students understood, the educational experience of both groups of students could hardly be described as being equal.

The State does not join the City in advancing this claim. Indeed, reference to A New Compact for Learning is again relevant. The Second principle of the Compact reads:

> Our mission is not to keep school - it is to see that children learn. The energies of all participants should be focused on achieving the desired outcomes. Accountability does not end with following established rules and procedures; its essence is found in results.
>
> (Emphasis added.)

The fourth principle of the Compact reads:

> Every child in New York State is entitled to the resources necessary to provide the sound, basic education which that State Constitution requires. The requirement is not equality input, but equity of outcome.
>
> (Emphasis added.)

The concept that the State's standard is not equality of input but equity of outcome is repeatedly stressed in the Compact. See, e.g., p. 5.

Our point is not that some State criterion is allegedly being violated by the YPS. Rather the point is that it is accepted doctrine among educators that one looks to results to measure equity of educational opportunity.

The City also asserts that the decision made by Superintendent Donald Batista to use the Metropolitan Achievement Test ("MAT") skews the results because the tests are themselves racially biased and that other tests were available, and that many of these achievement tests were available in languages other than English. City Post-Trial Brief, p.9.

We reject the suggestion that the Superintendent deliberately selected a test which would lower the levels of the achievement realized in the Yonkers Public Schools. Such a scenario is simply too Machiavellian to be attributed to this conscientious and dedicated educator. Nor do we believe it is improper or unfair to use the MAT. Although the MAT may indeed reflect a cultural bias and require a degree of proficiency in English, it is a useful measure of academic achievement and is an accepted measure of how our society determines educational levels.

Which brings us to the critical question whether it is in fact the case that minority students (black and hispanic) lag behind majority students (for these purposes, white and Asian students) in reading and math as measured by those test results. We find that they do, and that to a statistically significant extent, race is a factor with regard to levels of academic achievement in the Yonkers Public Schools.

As plaintiffs have amply demonstrated, the raw data discloses that minority students score appreciably below majority students in their reading and math scores. More significantly, the multiple regression analysis performed by the YBE's expert, Dr. Jamills Braddock (Appendix A hereto) demonstrates that race is a statistically significant factor in accounting for this disparity even after factoring out other possible causes such as placement in special education, limited English proficiency, receiving free or reduced lunches (used as a proxy for socio-economic status), prior test scores, and attendance at schools heavily impacted with students receiving free or reduced lunches.

A considerable portion of the defendants' argument at trial and in their post-trial briefs is devoted to an attack on Dr. Braddock's methodology. But even if the Court were to disregard Dr. Braddock's analysis in its entirety and rely solely on the analysis of the State's own expert, Dr. David Rindskopf (Appendix B), the conclusion that race is a statistically significant factor with regard to math and reading achievement levels would remain unchanged.

When Dr. Rindskopf addressed the question "whether there were race differences in test performance after taking into account other possible reasons for race differences other than what might be going on in school" (Tr. 1992), the answer was in the affirmative up to the stage in the analysis when an adjustment was made based on residence in the same southwestern Yonkers census tract. But we find unpersuasive the reasons advanced for this selective use of residence in a southwestern Yonkers census tract as a relevant factor. (Dr. Braddock had utilized attendance at a school having a large percentage of students receiving free lunches to adjust for neighborhood and other environmental and socio-economic factors.)

Unquestionably both the YBE's and the State's statistical analysis suffer from a lack of adequate base data as the City's expert witness, Dr. David Steinberg, has testified. However, on balance, we find that the YBE has sustained its burden of proving that race is a significantly significant factor in the gap which exists, and appears to be widening, between minority and majority achievement levels measured by math and reading MAT results. Although the YBE describes achievement results as a vestige, we regard such results to be the consequence of conditions which are themselves more properly regarded as the vestiges.

A myriad of other factors (birth weight, educational and occupational background of parents, parental interest and involvement, single parents status, proficiency in English, mobility and other socio-economic factors) undoubtedly impact greatly on a child's readiness to learn. However, if we begin as all parties do with the premise that all children can learn and recognize that school occupies as much as it does of a child's life, the YBE's burden of showing that these achievement disparities result from vestiges of segregation is not a heavy one.[3]

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[3] In our liability opinion, we noted that unlike attendance zone changes or school openings "whose numerical and racial impact can be fairly readily evaluated" (624 F. Supp. 1438, n. 110), academic performance is influenced

Causes of Disparities in Achievement

The YBE's evidence concerning the probable causes of disparate achievement levels is largely anecdotal but it comes from educators intimately involved in the Yonkers Public School system. They assert that there are two significant respects in which the Yonkers school system is inadequately addressing the needs of minority students. The first relates to what is being taught, (i.e., the curriculum) and more importantly, the techniques of teaching being utilized, often by teachers inadequately trained in dealing with multi-culture classes and who have reduced expectations of what minority students can achieve. The second respect in which there is an alleged failure adequately to address the needs of the school system as it is in transition from a dual to a unitary system relates to available facilities and equipment.

It does not require much expertise to appreciate that different approaches may be appropriate in teaching a larger class of students from diverse backgrounds than in teaching a more homogeneous group. Nor is it surprising to hear educators urge that there is a need for a curriculum which is more meaningful to minority students that the classic majority-oriented curriculum. Moreover, it has been well recognized that students are highly responsive to the expectation of their teachers. Too often anticipation of a low achievement level becomes a self-fulfilling prophesy.

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by factors over which the Board has no control, such as socio-economic factors." We went on to state, "In the absence of concrete and similarly persuasive evidence demonstrating the accuracy and statistically meaningful nature of the purported correlation between achievement tests scores and the conduct of Yonkers school officials, we are unwilling to conclude on the basis of minority students' lower achievement test scores that such students have been denied the educational opportunities afforded other students in the district." We now find that such "concrete" and persuasive evidence has been presented.

The YBE asserts that it lacks funds to train teachers adequately, revise curriculum, fully utilize the many programs which have been developed by such institutions as John Hopkins, employ sorely needed social workers and guidance counsellors, and otherwise address the educational needs of all of the Yonkers students.

It urges that the failure to meet these needs are reflected not only in MAT test results but also in disproportionate referral of minority students to special education classes, suspensions, retentions, and drop-outs. It proposes in great detail in EIP II how it would seek to address these matters were it fiscally able to do so.

Facilities

As noted, plaintiffs urge that there are inadequate facilities to enable full implementation of EIP I and to eradicate vestiges of segregation from the YPS. Although plaintiffs had originally characterized the lack of adequate facilities as itself being a vestige, the claim now advanced is that lack of adequate facilities impedes implementation of desegregation. Tr. pp 189-90. This shift in position is well advised since it is clear that there is little or no correlation between the adequacy of a particular school facility and its prior racial identification.

The YBE has prepared an extensive facilities study, "The Ingraham Report," which, though not put forth as a master plan, lays out an extensive (and expensive) long range program of facility renovation and construction.

All parties agree that the population trends in Yonkers will call for the construction of at least one new elementary school in Yonkers. It is also clear that many schools in Yonkers are old, decrepit, and suffer from years of deferred maintenance occasioned by lack of funds. What is disputed is the extent to which facility improvement is needed for purposes of desegregation.

The YBE urges that the critical factor in implementing EIP I is a voluntary magnet program. This magnet program must have sufficient appeal so that it encourages majority students to remain in the YPS and encourages both majority and minority students to attend schools other than neighborhood schools. The YBE urges that no matter how appealing the content of a magnet school program may be, if it is housed in an inadequate facility, parents as well as students are likely to look elsewhere. Ample testimony has been presented to satisfy the Court, and we find that existing facilities are inadequate to implement fully EIP I, let along implement EIP II.

We cite but one example. Surely the advent of desegregation has resulted in a greater need for the services of social workers and guidance counsellors. Ironically despite this greater need, the ratio of such support staff to students has decreased. Where once there was a social worker assigned to each school building, this is no longer the case. Moreover, social workers devote much of their time to preparation of case histories for special ed. referrals rather than student counselling. All of this is of course relevant to the first portion of our vestige analysis. But the testimony also supports the finding that some schools are so overcrowded that office space does not exist to provide a suitable place for social workers and guidance counsellors to meet with the students.

We find that eradication of vestiges of segregation in the YPS will require improvement of facilities and furnishing additional equipment (e.g., computers) and supplies, the exact extent of which is beyond the scope of this phase of these proceedings.

The Defenses Asserted

Defendants urge that the experience of the YPS, including lower minority achievement test scores and other circumstances such as disproportionate suspension rates, retentions and drop-outs, is not peculiar to the YPS but reflects national trends.

Studies with respect to achievement scores support the claim that the problem is not limited to Yonkers but affects other urban desegregating schools as well. But the widespread nature of the problem of adequately addressing the needs of minority children does not provide an excuse for inaction. Rather the data gathered and techniques (e.g., cooperative learning[4]) developed in other communities and universities, provide a resource and opportunity to improve the manner in which the problem may be addressed in Yonkers.

Defendants further urge that the failure to implement adequately teacher training to address the needs of heterogeneous classes is not a function of lack of funds but results instead from teacher intransigence.

First, teacher training is in fact costly. Such training must take place either during regular class hours (incurring the cost of a substitute teacher to cover the class to which the trainee was regularly assigned) or must be conducted after hours (incurring overtime costs). We find that lack of funds, not disinterest, has inhibited the extent of teacher training in Yonkers.

Defendants advance the further claim that under the "Academic Freedom" clause of the collective bargaining agreement,[5] a teacher may resist all efforts to introduce innovative teaching techniques, such as cooperative learning, into that teacher's classroom without being subject to discipline or sanction.

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[4] Cooperative Learning is a teaching technique in which students are clustered to work jointly in solving a problem or in some other learning exercise.

[5] Agreement between the Board of Education of the City of Yonkers, New York and the Yonkers Federation of Teachers, A.F.T. The full text of this provision is set forth in Appendix C hereto.

We believe this contention to be more theoretical than real. For the most part teachers enter the profession out of a desire to teach to students who learn. The Academic Freedom clause (Appendix C) appears to relate to content rather than methodology (e.g., the right to teach evolution). While there may be one or two teachers so set in their ways as to be unable or unwilling to master new teaching techniques, we accept the testimony of the YBE witnesses that the number of such teachers would be so negligible as not to have a significant impact on the YPS.

Further, defendants urge that EIP II is essentially designed to improve Yonkers public education overall rather than to address specifically areas relating to segregation. The State urges that "a remedy for unconstitutional conditions in schools is impermissible if it is addressed to a general improvement in the quality of the local school system." Arthur v. Nyquist, 712 F.2d 809 (2d Cir. 1983), cert. denied, 466 U.S. 936 (1984). While this may be true, it is equally the case that an effort to eradicate vestiges of desegregation cannot be faulted because majority students may benefit as well.

We find that vestiges of segregation exist in the YPS and that the YBE seeks to address those vestiges. A court should not decline to invoke a desegregation remedy simply because it improves education for both minority and non-minority students. See Jenkins v. Messeur, 855 F.2d, 1295, 1303 (8th Cir. 1988), cert. denied on relevant question, 490 U.S. 1034 (1989); accord Arthur v. Nyquist, 712 F.2d 809, 813 (2d cir. 1983), cert. denied, 466 U.S. 936 (1984).

The State argues that since so many students entered the YPS after EIP I was implemented and since they were never therefore subjected to a segregated school system, any shortcomings in their educational experience cannot be attributable to segregation. The argument is entirely circular. If all vestiges of

segregation were eradicated prior to a student's entry into the YPS, obviously such a student would have suffered no injury because of past history. If however, vestiges of segregation continue in the YPS, a newcomer is nevertheless subject to the adverse effects of such segregation which continue to impact on the educational experience of that student.

Finally, and of greater concern, is the claim that EIP I has been entirely successful and the circumstances upon which the YBE now relies are entirely the result of demographic changes in Yonkers over which the YBE has no control.

In 1985 the YPS had a total student population of 18,945, of which 10,070 (53.2%) were white (including Asians), and 8,875 (46.8%) were black and hispanic. In 1985, the black and hispanic students were at almost equal levels (4,563 black; 4,290 hispanic). (Ex. 31). For the 1992 school year, the total student population was 20,246, of which 7,080 (35.0%) were white, and 13,166 (65%) were black and hispanic. (Ex. 3A). In 1992 the minority student population consisted of 5,750 black and 7,416 hispanic students. (Ex. 31).

Thus two trends are apparent. There has been a diminution in the number of white students attending the YPS and a large influx of hispanics.[6]

The influx of hispanic students has no doubt placed great strains on the YPS. This results not only from the sheer numbers but the fact that many of the recent entries come with little or no English proficiency and little schooling in their native lands. It

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[6] As to the diminution in white students, a study commissioned by the YBE in 1988, prepared by Christine H. Rossell of Boston University, attributed this demographic change to factors other than the traditional white flight from a desegregating school system. Analysis of Enrollment Trends, December 29, 1988; YBE Ex. 31.

also appears that the recent wave of hispanic immigrants comes from various countries in Central America and are themselves a less cohesive group than the earlier hispanic immigrants who came primarily from Puerto Rico and Santo Domingo.

But these demographic changes do not explain or condone the failure to eradicate vestiges of segregation. This is not a case where white flight skews the minority/majority balance in the public schools. A school board takes its student body as it finds it, and although the influx of new hispanic children with special educational needs doubtless adds considerably to the YBE's burdens, it does not change the basic nature of its task. Nor has it diminished the YBE's commitment to eradicate vestiges of segregation given the means to do so.

Conclusion

Although the limited scope of this phase of the proceedings (see pages 3-5 supra) does not encompass an overall consideration of fiscal matters, it is appropriate to note, placing these issues in context, that Yonkers has had a long history of funding its school system less generously than its more affluent Westchester neighbors. (The median income for a Yonkers family of four according to the 1990 census was $44,000, compared to $55,000 for the County as a whole).

Because Yonkers has offered lower starting salaries than other Westchester communities or nearby New York City, has endured repeated budget crises, and perhaps because of the political and social turmoil which has been a part of Yonkers life for so long, teacher recruitment has not been easy.

According to Assistant Superintendent Joseph Michael Guerney, Yonkers spends less per capita for education than any other community in Westchester and would continue to do so even if the entire burden of funding EIP II were placed upon the City. (Tr. 1632, 1633).

Operating in this fiscal context and in a city which has in the past resisted housing desegregation efforts with astonishing tenacity, the YBE's task of integrating its long segregated school system is indeed a formidable one. We find that the YBE, its former Superintendent, Dr. Joan Raymond, and her successor, Dr. Donald Batista, and their staffs, addressed this task with enthusiasm and a sincere desire to make EIP I succeed. This case is markedly different from the many cases in which further relief is sought by class representative because the managers of the City's school system have been either passive or half-hearted in their efforts to desegregate.

We are satisfied that Dr. Batista's evaluation of the problems confronting the YBE in its efforts to eradicate vestiges of segregation is an accurate one. We find that although minority students in Yonkers attend school in the same buildings as majority students, they are undergoing different educational experiences. Proof of this lies, we believe, in the data shown with respect to achievement scores, suspensions, retentions and drop-outs rates.

We therefore answer the questions posed in our July 10, 1992 Opinion as follows:

(1) We find that vestiges of segregation remain in the Yonkers Public School system.

(2) We find that many steps are being taken to address these vestiges including teacher training programs, utilization of innovative teaching techniques devised and tested elsewhere, efforts to increase parental involvement, development of magnet school programs, and similar efforts.

(3) We find that the steps being taken in (2) above are inadequate to eradicate vestiges of segregation "root and branch" and must be expanded and implemented in a manner which of

necessity will entail the expenditure of additional funds. Not only must teaching techniques and curriculum be reexamined and redesigned to meet these needs, but the physical condition of the YPS must be restored and enhanced if a desegregation program which relies primarily on voluntary selection of magnet schools is to retain its accomplishments to date and attain its ultimate goal of a truly unitary school system.

We emphasize that we have answered these three questions only and have not addressed any questions relating to the State's liability for the existence of these conditions nor any question relating to the relative responsibility of the City and State. These further questions will be addressed at the next stage of these proceedings.

The parties are to confer and advise the Court in writing by Oct. 4, 1993 when they will be ready to proceed to trial on the remaining questions.

SO ORDERED.

Dated: August 30, 1993
New York, New York

LEONARD B. SAND,
U.S.D.J.

TABLE 1-A

Effects of Student Race Ethnicity on 1990 (90-91 School Year)
Metropolitan Achievement Test Scores (Reading)
With Controls for Student Background, Prior Achievement Tests,
and School Characteristics

	Unadjusted		(Add) Student Background[1]		(Add) Prior-Test Scores[2]		(Add) School Characteristics[3]	
Grade	B	t	B	t	B	t	B	t
FIRST (N-991)								
African American	-30.988	10.20***	-27.446	8.93***	-19.908	5.76***	-18.774	5.42*
Latino	-34.132	11.87***	-15.934	4.93***	-12.101	3.39***	-12.358	3.49*
Adjusted R^2	.111		.194		.272		.285	
SECOND (N-1018)								
African American	-31.324	10.51***	-26.469	9.20***	-16.854	5.27***	-17.701	5.47*
Latino	-40.454	14.21***	-15.535	5.09***	-9.789	2.93**	-10.050	3.01*
Adjusted R^2	.130		.266		.391		.394	

THIRD (N-885)								
African American	-36.138	12.52***	-31.079	11.37***	-23.496	7.54***	-24.746	7.95*
Latino	-40.618	14.39***	-14.083	4.78***	-9.537	2.87**	-9.619	2.91*
Adjusted R^2	.154		.325		.444		.453	
FOURTH (N-851)								
African American	-32.925	10.62***	-27.322	9.44***	13.428	4.62***	-13.108	4.48*
Latino	-42.488	14.93***	-13.891	4.64***	-3.984	1.84	-3.798	1.28
Adjusted R^2	.154		.338		.586		.587	
FIFTH (N-749)								
African American	-26.357	9.39***	-21.816	8.47***	-9.586	3.59***	-10.992	4.05*
Latino	-34.184	12.52***	-10.599	3.83***	-1.363	.47	-1.759	.61
Adjusted R^2	.121		.314		.553		.567	
SIXTH (N-757)								
African American	-24.075	7.64***	-18.693	6.23***	-7.142	2.14*	-7.826	2.33*
Latino	-34.458	11.15***	-12.889	4.08***	-1.888	.54	-1.943	.55
Adjusted R^2	.099		.246		.433		.434	
SEVENTH (N-644)								
African American	-28.237	8.47***	-22.452	7.44**	-7.543	2.18*	-10.569	3.12*
Latino	-40.429	12.75***	-20.536	6.74**	-5.952	1.71[a]	-7.704	2.27*
Adjusted R^2	.122		.309		.535		.562	

EIGHTH (N-644)								
African American	-24.542	7.45***	-19.020	6.22***	-3.615'	1.05	-5.713	1.69@
Latino	-34.120	10.46***	-18.634	5.92**	-7.554	2.14*	-8.652	2.50*
Adjusted R^2	.095		.254		.473		.501	
NINTH (N-594)								
African American	-32.173	8.28***	-25.747	7.25***	-5.164	1.62	-5.253	1.68@
Latino	-44.145	11.62***	-22.786	6.11***	5.147	1.51	4.001	1.20
Adjusted R^2	.121		.299		.705		.715	

1 Student Background characteristics include controls for age, sex LEP status and SES (free lunch status)
2 Prior Test Scores are represented by student's first grade or earliest available MAT/MRI scores.
3 School Characteristics include controls for schools size (total enrollment) and poverty concentration (percent of students on free-reduced price lunch).

@ denotes $p<.10$
* denotes $p<.05$
** denotes $p<.01$
*** denotes $p<.001$

TABLE 1-B

Effects of Student Race-Ethnicity on 1990 (90-91 School Year)
Metropolitan Achievement Test Scores (Mathematics)
With Controls for Student Background, Prior Achievement Tests,
and School Characteristics

	Unadjusted		(Add) Student Background[1]		(Add) Prior-Test Scores[2]		(Add) School Characteristics[3]	
Grade	B	t	B	t	B	t	B	t
FIRST (N-987)								
African American	-30.206	10.04***	-26.824	8.65***	-11.425	3.58***	-9.754	3.06*
Latino	-25.122	8.83***	-9.551	2.93**	-4.735	1.46	-4.809	1.49
Adjusted R^2	.082		.136		.368		.381	
SECOND (N-1021)								
African American	-26.836	9.35***	-23.589	8.12***	-10.709	3.63***	-10.411	3.49*
Latino	-25.500	9.30***	-8.602	2.79**	-3.132	1.02	-2.892	.94
Adjusted R^2	.074		.142		.400		.404	

THIRD (N-885)								
African American	-28.577	11.78***	-24.146	10.00***	-12.778	4.85***	-13.023	4.89*
Latino	-25.701	10.84***	-8.655	8.33***	-2.680	.96	-2.812	1.01
Adjusted R^2	.113		.218		.426		.425	
FOURTH (N-858)								
African American	-31.201	10.87***	-26.441	9.30***	14.411	5.11***	-14.321	5.06*
Latino	-31.717	12.03***	-11.292	3.84***	-7.785	2.71**	-7.844	2.73*
Adjusted R^2	.121		.227		.516		.515	
FIFTH (N-761)								
African American	-26.658	9.85***	-28.604	8.85***	-9.417	3.38***	-9.413	3.35*
Latino	-22.879	8.69***	-7.869	2.75**	-1.587	.54	-1.609	.54
Adjusted R^2	.085		.179		.481		.479	
SIXTH (N-766)								
African American	-26.188	8.66***	-21.117	7.01***	-9.991	3.08**	-9.863	3.03
Latino	-26.849	9.05***	-12.283	3.87***	-3.953	1.17	-3.931	1.16
Adjusted R^2	.081		.158		.397		.396	
SEVENTH (N-648)								
African American	-27.236	9.81***	-23.005	8.71***	-11.810	3.65***	-14.148	4.43*
Latino	-29.717	11.26***	-17.094	6.41***	-6.148	1.89[a]	-7.457	2.33*
Adjusted R^2	.110		.224		.408		.432	

EIGHTH (N-631)								
African American	-25.525	9.07***	-21.267	7.82***	-12.146	3.56***	-14.766	4.52*
Latino	-24.476	8.77***	-14.307	5.11**	-7.768	2.22*	-9.321	2.78*
Adjusted R^2	.089		.189		.294		.358	
NINTH (N-581)								
African American	-36.488	11.62***	-30.271	10.08***	-16.355	4.98***	-16.296	5.15
Latino	-34.041	11.09***	-22.818	7.25***	3.933	1.12	5.433	1.61
Adjusted R^2	.147		.257		.536		.569	

1 Student Background characteristics include controls for age, sex LEP status and SES (free lunch status)
2 Prior Test Scores are represented by student's first grade or earliest available MAT/MRI scores.
3 School Characteristics include controls for schools size (total enrollment) and poverty concentration (percent of students on free-reduced price lunch).

@ denotes $p<.10$
* denotes $p<.05$
** denotes $p<.01$
*** denotes $p<.001$

TABLE 2-A

Effects of Student Race-Ethnicity on 1991 (91-92 School Year)
Metropolitan Achievement Test Scores (Reading)
With Controls for Student Background, Prior Achievement Tests,
and School Characteristics

	Unadjusted		(Add) Student Background[1]		(Add) Prior-Test Scores[2]		(Add) School Characteristics[3]	
Grade	B	t	B	t	B	t	B	t
FIRST (N-1181)								
African American	-31.561	10.24***	-24.181	7.69***	-17.062	5.26***	-18.274	5.72***
Latino	-33.395	11.64***	-13.617	4.34**	-11.385	3.56***	-12.822	4.10***
Adjusted R^2	.099		.197		.311		.343	
SECOND (N-858)								
African American	-29.778	9.28***	-22.100	6.89***	-13.026	3.33***	-14.507	3.69***
Latino	-39.075	12.85***	-15.993	4.85***	-11.541	2.92**	-12.380	3.15**
Adjusted R^2	.111		.238		.330		.341	

THIRD (N-916)								
African American	-25.022	8.79***	-21.565	7.74***	-12.616	3.85***	-12.572	3.84***
Latino	-34.463	12.88***	-11.236	3.84***	-8.535	2.53**	-8.928	2.68**
Adjusted R^2	.105		.233		.360		.374	
FOURTH (N-815)								
African American	-29.257	10.28***	-26.403	9.81***	-12.997	4.09***	-14.337	4.50***
Latino	-37.507	13.52***	-11.439	3.95***	-5.334	1.60	-5.304	1.60
Adjusted R^2	.121		.294		.472		.479	
FIFTH (N-806)								
African American	-30.082	11.00***	-25.247	9.70***	-13.705	4.78***	-14.613	5.08***
Latino	-32.528	13.00***	-9.954	3.71***	-2.825	.97	-3.412	1.17
Adjusted R^2	.125		.269		.504		.508	
SIXTH (N-712)								
African American	-26.534	8.75***	-23.147	8.18***	-7.682	2.29*	-9.739	2.96**
Latino	-35.736	12.29***	-14.463	4.77***	-1.641	.46	-1.855	.54
Adjusted R^2	.108		.253		.468		.492	
SEVENTH (N-745)								
African American	-26.407	8.58***	-24.709	8.65***	-10.699	3.26***	-11.651	3.66***
Latino	-41.354	13.99***	-20.843	6.89***	-6.259	1.80[a]	-7.104	2.11*
Adjusted R^2	.132		.274		.482		.512	

EIGHTH (N-587)								
African American	-26.223	7.57***	-24.299	7.49***	-5.933	1.46	-6.706	1.70[@]
Latino	-35.713	10.77***	-17.925	5.34***	-1.615	.39	-2.747	.68
Adjusted R^2	.093		.217		.440		.477	
NINTH (N-577)								
African American	-24.950	6.49***	-20.783	5.91***	-7.574	2.03*	-8.250	2.24*
Latino	-39.280	10.79***	-15.860	4.47***	4.059	1.06	4.046	1.07
Adjusted R^2	.096		.282		.589		.603	

1 Student Background characteristics include controls for age, sex LEP status and SES (free lunch status)
2 Prior Test Scores are represented by student's first grade or earliest available MAT/MRI scores.
3 School Characteristics include controls for schools size (total enrollment) and poverty concentration (percent of students on free-reduced price lunch).

[@] denotes $p<.10$
* denotes $p<.05$
** denotes $p<.01$
*** denotes $p<.001$

TABLE 2-B

Effects of Student Race-Ethnicity on 1991 (91-92 School Year) Metropolitan Achievement Test Scores (Mathematics) With Controls for Student Background, Prior Achievement Tests, and School Characteristics

	Unadjusted		(Add) Student Background[1]		(Add) Prior-Test Scores[2]		(Add) School Characteristics[3]	
Grade	B	t	B	t	B	t	B	t
FIRST (N-1174)								
African American	-24.425	8.19***	-19.449	6.20***	-7.805	2.59**	-8.031	2.63*
Latino	-23.384	8.43***	-9.053	2.90**	-7.510	2.52**	-8.084	2.73*
Adjusted R^2	.058		.111		.338		.346	
SECOND (N-853)								
African American	-28.343	9.45***	-22.084	7.09***	-6.800	1.95*	-7.975	2.26*
Latino	-30.272	10.65***	-13.676	4.27***	-9.237	2.65**	-9.613	2.76*
Adjusted R^2	.087		.156		.390		.392	

THIRD (N-917)								
African American	-21.710	9.05***	-18.153	7.50***	-8.721	3024***	-7.822	2.88*
Latino	-23.138	10.27***	-7.613	2.99**	-6.364	2.30*	-6.469	2.34*
Adjusted R^2	.079		.160		.370		.372	
FOURTH (N-819)								
African American	-26.192	9.91***	-23.305	8.88***	-8.651	2.87**	-9.046	2.87*
Latino	-30.253	11.74***	-12.350	4.37***	-5.220	1.65@	-5.234	1.65
Adjusted R^2	.098		.200		.438		.438	
FIFTH (N-813)								
African American	-31.065	11.81***	-27.988	10.59***	-17.578	6.27***	-17.316	6.16
Latino	-24.495	10.17***	-11.047	4.08***	-9.031	3.17**	-8.92	3.13
Adjusted R^2	.107		.169		.465		.465	
SIXTH (N-721)								
African American	-27.996	9.67***	-24.868	8.74***	-7.995	2.44*	-8.656	2.60
Latino	-21.531	7.76***	-10.813	3.55***	-1.859	.54	1.62	.47
Adjusted R^2	.097		.138		.417		.418	
SEVENTH (N-757)								
African American	-25.482	9.68***	-22.797	4.52***	-12.272	4.30***	-12.898	4.69
Latino	-27.765	10.95***	-15.644	5.82***	-6.926	2.31*	-7.16	2.48
Adjusted R^2	.097		.187		.427		.470	

EIGHTH (N-589)								
African American	-29.619	9.68***	-27.386	9.31***	-14.089	3.75***	-14.779	4.15
Latino	-29.710	10.14***	-17.274	5.68***	-9.541	2.51**	-9.699	2.70
Adjusted R^2	.098		.180		.377		.445	
NINTH (N-571)								
African American	-29.533	10.01***	-25.408	8.89***	-12.607	3.72***	-14.068	4.3
Latino	-28.576	10.23***	-16.073	5.57***	-.671	.19	-1.357	.4
Adjusted R^2	.112		.210		.451		.492	

1 Student Background characteristics include controls for age, sex LEP status and SES (free lunch status)
2 Prior Test Scores are represented by student's first grade or earliest available MAT/MRI scores.
3 School Characteristics include controls for schools size (total enrollment) and poverty concentration (percent of students on free-reduced price lunch).

@ denotes $p<.10$
* denotes $p<.05$
** denotes $p<.01$
*** denotes $p<.001$

TABLE 3

Summary of Significant Student Race-Ethnicity Effects on MAT Scores

GRADE	SUBJECT(S) READING			MATHEMATICS		
		1990-91	1991-92		1990-91	1991-92
FIRST	African American	(-19)	(-18)	African American	(-10)	(- 8)
	Latino	(-12)	(-13)	Latino		(- 8)
SECOND	African American	(-18)	(-15)	African American	(-10)	(- 8)
	Latino	(-10)	(-12)	Latino		(-10)
THIRD	African American	(-25)	(-13)	African American	(-13)	(- 8)
	Latino	(- 9)	(- 9)			
FOURTH	African American	(-13)	(-14)	African American	(-14)	(- 9)
				Latino	(- 8)	(- 5)*
FIFTH	African American	(-11)	(-15)	African American	(- 9)	(-17)
				Latino		(- 9)

SIXTH	African American	(- 8)	(-10)	African American	(-10)	(- 9)
SEVENTH	African American	(-11)	(-12)	African American	(-14)	(-13)
	Latino	(- 8)	(- 7)	Latino	(- 7)	(- 7)
EIGHTH	African American	(- 6)*	(- 7)*	African American	(-15)	(-15)
	Latino	(- 9)		Latino	(- 9)	(-10)
NINTH	African American	(- 5)*	(- 8)	African American	(-16)	(-14)

NOTE: Numbers (unstandardized beta's) in parentheses represents significant differences from white students MAT scores at or beyond the .05 level, unless denoted by an asterisk which indicates difference from white students MAT scores at the .10 level.

TABLE 3 (1991)

SUMMARY OF STATISTICALLY SIGNIFICANT RACE DIFFERENCES CONTROLLING FOR VARIOUS VARIABLES

	No Controls			Control For: Speced, Lep			Control For: Speced, Lep Lunch=(F, R)			Control For: Speced, Lep Lunch≠(F, R)			Control For: Speced, Lep Lunch=(F,r) Census t	
	BW	BH	HW	BW	BH	HW	BW	BH	HW	BW	BH	HW	BW	BH
GRADE = 1,2														
Reading	W	B	W	W	H	W	W	H	•	W	•	W	•	•
Math	W	•	W	W	H	W	W	H	•	W	•	W	•	H
Language	W	B	W	W	•	W	W	H	•	W	•	W	•	•
Total	W	•	W	W	H	W	W	H	•	W	•	W	•	•
Grade = 3-4														
Reading	W	B	W	W	H	W	W	H	W	W	•	W	•	H
Math	W	•	W	W	H	W	W	H	W	W	•	W	•	•
Language	W	•	W	W	H	W	W	H	•	W	•	W	•	H
Total	W	•	W	W	H	W	W	H	•	W	•	W	•	H

	BW	BH	HW	BW	BH	HW	BW	BH	HW	BW	BH	HW	BW	BH
GRADE = 5-6														
Reading	W	B	W	W	•	W	W	•	W	W	•	W	•	•
Math	W	•	W	W	H	W	W	H	•	W	•	W	•	•
Language	W	B	W	W	•	W	W	H	W	W	•	W	•	•
Total	W	•	W	W	•	W	W	H	W	W	•	W	•	•
Grade = 7-9														
Reading	W	B	W	W	•	W	W	•	W	W	•	W	•	•
Math	W	•	W	W	•	W	W	•	W	W	•	W	•	•
Language	W	B	W	W	•	W	W	•	W	W	•	W	•	•
Total	W	B	W	W	•	W	W	•	W	W	•	W	•	•

Notes: B=Black; H=Hispanic; W=White.
BW = The B W comparison
BH = The B H comparison
HW = The H W comparison
A significant difference is represented by the label for the higher scoring group.
A dot represents a non-significant difference.

19. ACADEMIC FREEDOM

The nature of American Democracy demands that citizens be able to listen to all sides of a controversial issue, sort out the facts, and arrive at independent conclusions. Students in school, therefore, have a right to be exposed to issues which are within their intellectual grasp and are under current debate in society. This right imposes certain obligations upon the teachers and the administration.

The Board will attempt to employ qualified teachers, to supply them with the necessary teaching materials and to maintain an atmosphere of academic freedom in the schools.

The teachers, individually, will be responsible for determining when and how to deal with controversial issues according to the maturity and abilities of their students and in accordance with current Board policies and will be responsible for the evaluation of their student's work.

The administration shall be available to assist teachers when in doubt as to the appropriateness of certain controversial issues. It shall further have the responsibility of approval of any and all speakers brought into the schools to present a viewpoint to students.

The Board and the Federation agree that the community and the students have the right to expect that controversial issues will be presented in a fair and unbiased nature and the parties agree that they will take reasonable steps to assure this.

May 13, 1986
Order of the District Court Against The City of Yonkers and Yonkers Board of Education (EIP I Order)

ORDER FOR DESEGREGATION OF THE YONKERS PUBLIC SCHOOL SYSTEM

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

and

YONKERS BRANCH, NAACP, et al.,

Plaintiffs-Intervenors,

vs.

Civil Action No. 80 CIV. 6761 (LBS)

YONKERS BOARD OF EDUCATION, CITY OF YONKERS AND YONKERS COMMUNITY DEVELOPMENT AGENCY,

Defendants.

May 13, 1986

Introduction

On November 20, 1985, this Court held that actions taken by the City of Yonkers and the Board of Education, with respect to housing and public schools were in whole or in part intentionally segregative. United States v. Yonkers Board of Education, 624 F. Supp. 1276 (S.D.N.Y.). On December 18, 1985 the Court established a schedule for the action's remedy phase. The Yonkers Board of Education and the City of Yonkers were directed to submit remedy proposals on or before February 17, 1986.

On February 17, 1986, the Yonkers Board of Education submitted to the Court and the parties its proposed remedial plan, entitled "Educational Improvement Plan for the Yonkers Public School System". The United States and Plaintiffs-Intervenors (hereinafter "the NAACP") filed their responses to the Board's remedial proposal by March 12, 1986. On April 2, 1986 the Board filed modifications to its original remedial proposal, entitled "Modifications to the Educational Improvement Plan submitted on February 17, 1986" to which the United States and the NAACP filed responses by April 7, 1986.

The Court conducted a hearing from April 8, 1986 through April 15, 1986 receiving testimony and documentary evidence to assist it in fashioning an appropriate remedy for the unlawful condition of segregation found to exist in the Yonkers Public Schools.

On April 22, 1986, this Court issued its Opinion and Proposed Remedial Order. On May 7, 1986, the Board submitted its Response and Objections to the Court's Proposed Remedial Order. Following consultation with all the parties the Court

hereby sets forth its order for the desegregation of the Yonkers Public School System.

A. IMPLEMENTATION STRATEGIES

The implementation strategies which form the foundation for the Yonkers Public School's Educational Improvement Plan shall include:

1. School Closings

The district shall close the following schools effective September, 1986:

School #6
School #10
School #11
School #32
School #34
Fermi Middle School
Hawthorne Middle School
Yonkers High School

2. Elementary Schools

The district shall operate the following elementary schools effective September, 1986:

School #5
School #8
School #9
School #13
School #14
School #16
School #17
School #19
School #21
School #22

School #23
School #26
School #28
School #29
School #30
Enrico Fermi

The attendance zones for these schools shall be those areas set forth in Appendix A. During the 1986-87 school year, the Board shall develop and begin to implement attendance area magnet programs designated for School 19 and Enrico Fermi, to open September 1987.

3. Dedicated Magnet Schools

The district shall operate dedicated magnet schools to reduce racial/ethnic isolation by attracting students to programs that emphasize areas of special interest. Students will be recruited to leave their regular attendance zone school to enroll in schools that have no specific attendance zone.

The district shall operate the following districtwide dedicated magnet schools effective September, 1986:

School #10 - Early Childhood Center (Pre-K)
PEARLS - Gifted and Talented (Pre K-6)

Hudson River Museum Junior High School - Science, Social Studies and Creative Arts, Gifted and Talented (7-9)

Saunders Trades, Technical, Business and Computer High School (and Academic Magnet Component)

Until the new Hudson River Junior High School is completed the 7-9 Gifted and Talented magnet program currently housed in Emerson and Mark Twain will be moved to Hawthorne. In addition, the 4-6 Gifted and Talented component of the PEARLS program planned for September, 1986 will also be housed in Hawthorne. Upon the opening of the Hudson River Junior High School, Hawthorne shall house the PEARLS Program Pre-K-6. Until the new Hudson River Junior High School is completed, the Pre-K-3 component of the PEARLS program will be housed at School #32.

Admission criteria for dedicated magnet schools, as well as for other magnet and specialized programs, will be submitted to a court appointed Monitor by June 1, 1986 for the magnet schools and programs to be implemented in September 1986 and by January 15, 1987 for the magnet schools and programs to be implemented in September 1987. Any party may offer its comments on such criteria to the Monitor. This procedure will be followed whenever a new program is slated to commence in the ensuing school term. All magnet students will take the required subjects and course work necessary for promotion and graduation, and all high school magnet students will have the opportunity to meet college entrance requirements.

By June 15, 1986, the Board shall provide the Monitor and the parties with the description of the academic program to be offered at Saunders.

4. Attendance Area Magnet Schools

The district shall operate the following attendance area magnet schools effective September, 1986:

School #18 - Scholastic Academy for Traditional Education (K-6)

School #25 - Science, Social Studies, Physical Development, Creative Arts, Extended Day (K-6)

School #27 - Montessori, Humanities and Creative Arts, Extended Day (K-6)

Martin Luther King - High Technology Computer Assisted Instruction, Extended Day (K-6)

Burroughs Junior High School - Center Development and Pre-Vocational (7-9)

Emerson Junior High School - Performing and Visual Arts, Multilingual Education (7-9)

Mark Twain Junior High School - Physical Development (7-9)

Gorton Senior High School - Pre-Professional Magnet Program (10-12)

Lincoln Senior High School - Performing Arts Magnet Program (10-12)

Roosevelt Senior High School - Communication Arts Magnet Program (10-12)

Effective September 1987, the following additional attendance area magnet schools will be opened:

School #19 - Multilanguage Options - Global Perspective (K-6)

Enrico Fermi - Computer Assisted Instruction and Performing Arts (K-6)

The attendance zones for all of the attendance area magnet schools are set forth in Appendix A.

For the first year of this Order, the attendance area elementary magnet schools will be integrated by an admission policy which will afford an opportunity for enrollment to all students in the district to the maximum extent consistent with the integration goals of this Order. In implementing this policy, the Board may impose such limitations as shall be appropriate to achieve its objectives.

At the secondary level, attendance area students and interested magnet students from throughout the district will be selected by application controlling for racial and ethnic balance.

5. Voluntary Student Transfers - VST

The district shall direct a Voluntary Student Transfer program permitting minority students wh attend predominately minority schools to transfer to non-minority schools. Conversely, white students attending predominately white schools may transfer to predominately minority schools of their choice for the same reason. The purpose of such transfers is to enhance the racial/ethnic balance of the receiving school. Such transfers will not be permitted, however, if they would adversely impact on the racial composition of either the receiving or the sending school.

To encourage Voluntary Student Transfers, enrichment and supplemental programs will be established in those schools where sufficient seating capacity has been identified.

3. School District Organization

The District shall establish a K-6, 7-9, 10-12 grade pattern organization as follows:

CIS = Compensatory Infusion Services
CAI = Computer Assisted Instruction
VST = Voluntary Student Transfer

School District Reorganization

School	Current Organization	Organization	Program Description*
#5	K-6 Neighborhood School	K-6 Neighborhood VST School	Writing to Read; Kindermath
#6	K-6 Neighborhood School	CLOSED	-
#8	K-6 Neighborhood School	K-6 Neighborhood VST School	Project Zoo
#9	K-6 Neighborhood School	K-6 Neighborhood School	-
#10	K-6 Neighborhood School	Early Childhood Center	Early Childhood Center (PreK)
#11	K-6 Neighborhood School	CLOSED	-
#13	K-6 Neighborhood School	K-6 Neighborhood School	Writing to Read
#14	K-6 Neighborhood School	K-6 Neighborhood VST School	Project Zoo
#16	K-6 Neighborhood School	K-6 Neighborhood School	-
#17	K-6 Neighborhood School	K-6 Neighborhood School	Writing to Read; Kindermath
#18	K-6 Neighborhood School	K-6 Attendance Area Magnet	Scholastic Academy for Traditional Ed; CIS
#19	K-6 Neighborhood School	K-6 Attend. Area Magnet (New Sch)	Multilanguage-Global Persp; Write to Read; CIS
#21	K-6 Neighborhood School	K-6 Neighborhood VST School	Foreign Language; Multicultural Ed. (FLAME)
#22	K-6 Neighborhood School	K-6 Neighborhood School	Foreign Language; Multicultural Ed. (FLAME)
#23	K-6 Neighborhood School	K-6 Neighborhood School	Kindermath; Every Child a Winner
#24	Warehouse	Warehouse	-
#25	K-6 Neighborhood School	K-6 Attendance Area Magnet	Sci; Soc.S.; Ph Dev.; Creat.Arts; Ext. Day
#26	K-6 Neighborhood School	K-6 Neighborhood VST School	Project Ecology

#27	K-6 Neighborhood School	K-6 Attendance Area Magnet	Montessori; Humanities; Creat. Arts; Ext Day; CIS
#28	K-6 Neighborhood School	K-6 Neighborhood VST School	Writing to Read; Kindermath
#29	K-6 Neighborhood School	K-6 Neighborhood VST School	Project Ecology
#30	K-6 Neighborhood School	K-6 Neighborhood VST School	Foreign Language; Multicultural Ed. (FLAME)
#31 PEARLS	PreK-2 Magnet School	Continuing Education Center	Continuing Education Center
#32	K-8 Neighborhood School	PEARLS PreK-3 (Temporary)	PreK-3 Gifted/Talented (PEARLS)
#34	K-6 Neighborhood School	Jr. H.S. Perf. Arts Magnet Prog.	Jr. H.S. Performing Arts Magnet Program
King	K-6 Neighborhood School	K-6 Attendance Area Magnet	High Tech; CAI; Ext. Day; Write to Read; CIS
Emerson	7-8 Neighborhood School	7-9 Jr. H.S. (Magnet Program)	Performing/Visual Arts; Multilangual Ed.
Fermi	7-8 Neighborhood School	K-6 Attendance Area Manget	CAI; Perf. Art; CIS; Every Child a Winner
Hawth.	7-8 Neighborhood School	4-6 PEARLS and 7-9 Jr. H.S.	Gifted and Talented (Grade 4-9)
Twain	7-8 Neighborhood School	7-9 Junior High School	Physical Development Program
Whitman	CLOSED	Teach. Train.Ctr/Adm. Complex	Teacher Train. Ctr/Adm. Complex***
Burroughs	-	7-9 Jr. H.S. Magnet	Career Development; Pre-Vocational
Hd.Rv.Mu.	-	7-9 Gift/Tal. Magnet (New Sch)	Science; Soc. St; Creat.Art; Gift/Tal.
Gorton	9-12 Neighborhood School	10-12 Senior Attend. Area H.S.	Pre-Professional Magnet Program
Linc.	9-12 Neighborhood School	10-12 Senior Attend. Area H.S.	Performing Arts Magnet Program
Roos.	9-12 Neighborhood School	10-12 Senior Attend. Area H.S.	Communication Arts Magnet Program
Saunders	10-12 Magnet School	10-12 Sr. H.S. Dedicated Magnet	Trades; Tech; Bus/Comp; Magnet School**
Yonkers	9-12 Neighborhood School	CLOSED: Saunders Moved In	

*All neighborhood schools will also have a common core of enrichment programs. The programs described here are above and beyond the common core.

**And a strong academic Magnet component the precise nature of which shall be recommended by the district and which may be commenced on a grade-a year basis.

***Subject to the Court's final decision regarding Whiteman following completion of the housing portion of the remedy hearings and without prejudice to that decision.

C. INTEGRATION GOALS AND TIMETABLE

The District shall seek to achieve the following levels of desegregation as measured by the percentage of students attending desegregated schools at the respective grade pattern organization levels:

Start of School Year	% of Elementary Students	% of Junior High Students	% of Senior High Students
1986 - 1987	50%	100%	100%
1987 - *	100%	100%	100%

For purposes of this Order and at the present time, a desegregated school shall be defined as within plus or minus 20 percentage points on the districtwide average of minority students, (the relevant minority population is comprised of Black and Hispanic students), for that grade pattern organization level; if the school is a dedicated magnet or an attendance area magnet, however, it is desegregated if its minority enrollment is within plus or minus 15 percentage points of the districtwide average of minority students at that grade pattern organization level during the first year of operation and plus or minus 10 percentage points of the districtwide average for that grade pattern organization level in the second year of operation.

*In the Spring of 1987, the Court will evaluate the progress made by the Board in the implementation of the voluntary aspects of this Order for the purpose of establishing an appropriate timetable for the achievement of such goals. The Board shall report to the Court on March 16, 1987 the extent to which its plan has succeeded in achieving these goals through voluntary transfers. Should sufficient majority race students not voluntarily transfer from identifiably white schools and/or

sufficient minority students not transfer to identifiably white schools, the Board shall propose its plan for accomplishing the desegregation of all it schools. The parties shall submit their comments to this proposal two weeks thereafter and, if necessary, the Court shall schedule an evidentiary hearing before ordering into effect a proposal to fully integrate Yonkers elementary schools through such techniques as enrollment caps, the redrawing of elementary school attendance lines, and other measures. To permit possible utilization of redrawn elementary school attendance lines, the Board shall submit to the Court and the parties, no later than January 5, 1987, its proposal for such lines drawn consistently with the criteria set forth in the Court's Opinion and Proposed Order of April 22, 1986. The extent to which any redrawn elementary school attendance lines would be effective for September 1987 would depend upon the progress made by the Board in implementing the voluntary aspects of this Order. Depending upon the degree of that progress, the Court may order implementation of the redrawn attendance lines in whole, in part or not at all.

Those schools which do not meet the district's integration goals and which remain predominantly minority during the transition period shall provide supplemental educational services.

C. STUDENT ASSIGNMENT

1. Recruitment

In order to maximize the extent to which the integrative goals of this order will be reached through voluntary student assignments, the administration of the Yonkers public school system will establish an intense recruitment phase which will include the following activities:

• dissemination of brochures and fliers describing the new program options throughout the city
• direct mailing of program options and descriptions to all parents
• newspaper, billboard and radio and cable television announcements of available magnet programs
• publication of all recruitment material in Spanish and Arabic
• school based recruitment meetings conducted by building administrators and central office staff
• telephone recruitment centers, English and Bilingual, through which parents will be called directly to explain magnet programs
• telephone hotline to respond to inquiries
• acceptance of initial registration by telephone as appropriate
• community meetings with minority groups and organizations to solicit support and assistance in the dissemination of magnet program availability
• door to door canvass by district personnel to explain magnet program availability
• magnet fair in which students and their parents will be transported to central display centers with movies, slides and material available for briefing

2. Selection

A fundamental aspect of the implementation procedures in the Remedy proposal will be the requirement that all parents must select the schools which their children will attend for September 1986 even if it is the attendance area school. Parents must indicate their first three choices for 1986-1987. For the first year, no student will be admitted into any school, magnet school, or attendance area school without the parent having indicated that selection as one of the three choices. The Board shall make every

effort to assign each student to the optimum choice school listed on his or her choice form.

For 1987-88, the parent or guardian of each student in the district will again be required (as early in the school year as is deemed feasible but no later than March 1, 1987) to submit to the Board in writing a school choice form listing three choices for his or her child. For the 1987-88 school term, at least one of the child's choices must be a school where that child's attendance will further the goals of desegregation as defined in this order. Again, the Board shall make every effort to assign each student to the optimum choice school listed on his or her form. The same procedure will be followed in subsequent years for students living in the district but attending public school for the first time, students born in the district who are beginning school, students transferring into the district, and students moving from one grade organizational level to the next (e.g., from junior high to high school).

This procedure will begin immediately after the issuance of this Order. In subsequent years, as much planning lead time shall be provided as is possible. The objective of requiring three options is to force a choice and thereby inform parents of the availability of magnet program options and encourage their selection. All applications will be logged and numbered and a receipt given for each application. Only one application per child will be accepted. The procedure would be initiated immediately after issuance of the Order and certainly before the end of the 1985-86 school year. In subsequent years, it would be initiated early in the school year to provide as much planning lead time as possible for the district and for parents. In addition to selection forms and program descriptions which will be mailed to all parents in the district, building principals, counselors and

teachers will be required to meet with parents and review the options available to them.

(a) Admission Criteria

After the initial selection phase has been completed, the district shall use the following process for admission into the magnet schools provided it does not hinder the district in achieving its goal for desegregation:

For those magnet schools or programs in which the requests of qualified students do not exceed stated capacity, those students will be immediately notified and admitted.

For those magnet schools or programs in which the requests of qualified students are greater than stated capacity, first priority will be given to those students already enrolled. Then, a random selection will be conducted on the basis of desired integrative goals. Such random selection will be conducted publicly with observers.

For those students whose first choice of a magnet school is not granted, the parents will be individually contacted to reaffirm the desirability of the second or third choice. Every effort shall be made at this stage to encourage the parents to accept the second or third choice of a magnet school. For those students who are placed on a waiting list at the request of the parents because of the unavailability of space, a requirement will be established that they must reapply during the next recruitment phase but will be given preference provided that the granting of such preference will not adversely impact the racial/ethnic balance of the school.

If admission criteria are met, every preference shall be given to the siblings of children already enrolled in magnet schools provided that such admission does not adversely impact on the racial/ethnic balance of the magnet school.

(b) Sibling Preference

When more applications for vacancies in a school or program are received than there are seats available, all applications will be randomly selected. After random selection, a rank-ordered waiting list, based on the random selection, will be developed. Names of siblings not initially accepted will be placed at the top of the rank-ordered waiting list. If only one twin is accepted the other twin will also be enrolled provided that whatever admission criteria exists, if any, are met.

(c) Admission to Specialized Programs

Gifted and Talented students selected for participation in the district's Gifted and Talented Magnet Programs are those who, by virtue of potential and/or achievement, are capable of high academic performance. Eligibility for the program is determined for each applicant following a careful analysis of standardized test scores, report card information, teacher input (on learning, task commitment, creativity and leadership) and parent input when possible. Entrance examinations will be included at the fourth grade level and above. All available information will be recorded and handled through a weighted matrix traditionally used for the selection of Gifted and Talented students. (Baldwin Matrix). On the basis of the test scores of the students who apply, a cut-off point will be determined and then students shall be admitted on a racial/ethnic balanced basis. It is anticipated that the selection will be geared toward the top five percent over the

district cut-off point or points on multi-measures. Student selection shall be made to ensure a balanced racial/ethnic student composition and will be conducted by a committee of at least three administrators, to include at least one of whom would be minority.

Enrollment in these programs continues from one grade level to the next provided a student is achieving at the expected rate and level and the parents desire program continuation. A student may be counseled out of the program if progress is poor and/or the program is not in the student's best interest.

Citywide High School Career Specialty Magnet Programs will enroll students who have a sincere interest and believe they have the ability to succeed. Prior to submitting an application for such a program, counseling services will be provided so that there is reasonable expectation that the student will meet the success. The student and parent will be provided with information clearly outlining the schools' programs, expectations, and course requirements. If the number of applicants exceeds the available space, students will be selected based upon aptitude for the specific area, teacher recommendation, report card information and attendance patterns. These data will be weighted and ranked to ensure balanced racial/ethnic participation. Student selection will be made by a team of at least three administrators, at least one of whom shall be a minority member.

The Performing and Visual Arts Magnets will accept applications from interested students who must also undergo an audition in their specific areas of interest. These areas include Dance, Drama, Vocal and Instrumental Music. Selection will be made on the basis of specific criteria for

each performing arts area. Student selection will be made to ensure racial/ethnic balance and selection will be made by a group of at least-three performing arts teachers, at least one of whom shall be a minority member.

Students applying for Fine Arts and Graphic Arts programs must submit a portfolio of work for review. Selection will be made on the basis of specific criteria for the Visual Arts. Student selection will be made to ensure a racial/ethnic balance and selection will be made by a group of at least three Visual Arts teachers, at least one of whom shall be a minority member.

(d) Notification of Status

Parents or guardians will be notified by mail indicating whether their children have been accepted, or placed on a waiting list for magnet schools or programs. Parents will be asked to confirm their intention to enroll their children in the program into which they have been accepted by mailing back within a stated return period, a confirmation letter which will have been enclosed in their letter of notification.

3. Appeal Procedure

Parents who wish to question admission procedures or appeal the decision of the selection committee will be required to put appeal in writing. The parent first will be invited to discuss the concern with a magnet counselor. If, after the counselor interview, the parent desires to continue the appeal, a Placement Review Committee will review all material and make a final determination of magnet placement. The decisions must not adversely affect the desegregative objectives of this Order. If a student cannot be accepted immediately after review, an

otherwise qualified student will be placed on a priority waiting list. The Placement Review Committee will be composed of at least three Central Office administrators to be determined by the Superintendent of Schools and will include minority participation.

E. STAFF ASSIGNMENT

The district shall make every effort to ensure that by September, 1986, the racial composition of teachers at each school within approximately plus or minus five percentage points of the districtwide average for minority teachers, as a result of reassignments in connection with school closings and conversions and the reassignment of teachers to magnet schools and magnet programs. Thereafter, the district shall attempt to maintain the racial distribution of teachers on a reasonably uniform basis, while respecting the provisions of the collective bargaining agreement between the district and the Yonkers Federation of Teachers.

If the Board cannot achieve this goal while adhering to the collecting bargaining agreement, the parties may make applications to the Court for the requisite modifications.

With respect to the staffing of magnet programs and magnet schools, the district and the Yonkers Federation of Teachers have agreed to establish a process for selection which would address the mutual concerns of both parties.

Although the Court denied the application by the NAACP for the adoption of an affirmative action hiring program at this time, such ruling is without prejudice to renewal subsequent to March 16, 1987 if it should appear that the aforesaid efforts of the Board and the Yonkers Federation of Teachers have not

achieved satisfactory levels of minority staff hiring and distribution throughout the Yonkers school system.

F. SPECIAL EDUCATION

1. Principles for Administration of Special Education

In the administration of its Special Education services, the district shall adhere to the following principles:

- That handicapped students by guaranteed the same constitutional rights provided all other students.

- That all other regular education interventions and strategies are explored and utilized where appropriate prior to a student's referral for and placement in special education programs.

- That in as much as special education is one among many instructional options encompassed within a continuum of educational services, it is the responsibility of both regular and special education to meet the educational needs of handicapped students, particularly with respect to such areas as occupational education, gifted and talented programs, limited English proficiency services and other magnet programs operated by the school district.

- That to the maximum extent appropriate, handicapped students should be educated with students who are not handicapped and that removal of handicapped students from the regular education environment should occur only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

- That handicapped students are entitled to the right to due process, and the right to participate in appropriate education programs and activities in the least restrictive environment.

- That the provision of appropriate educational opportunities for handicapped students is based on the identification and evaluation of each student's unique needs.

- That tests and evaluation materials will be non-discriminatory and utilized for the purpose intended.

- That all handicapped students and their parents should be afforded the protections of procedural due process in the identification, evaluation and placement within special education, including collection, use and dissemination of all data developed by the district for that purpose.

- That handicapped students be grouped for classroom placement by age-appropriate functioning level, and that such groupings reflect the system-wide racial/ethnic composition of all like special education groups at that functioning level, the only exception to this racial/ethnic criterion for grouping shall be those groupings designed for the provision of bilingual special education services.

- As legally mandated, each student receiving special education services will have an annual program review by the Committee on the Handicapped in order to evaluate the appropriateness and effectiveness of program placement and services and also a triennial assessment for the purpose of determining the need for continuation, change, or termination of special education services.

2. Criteria for Location of Special Education Program Within Individual Schools

- Programs for the following students; secondary - resource (R); secondary - learning problems (L); and secondary - emotional problems (E), will be placed in all junior and senior high schools with attendance zones to enable students requiring those programs to attend school in their home attendance zone.

- Programs for the following students; elementary - resource (R); elementary - learning problems (L); and elementary - emotional problems (E), will be placed in attendance zone elementary schools to the extent possible. In the absence of adequate numbers of students of like functioning level in each elementary attendance zone school, programs for students of like functioning level will be placed in schools closest to their attendance zone school.

- Programs providing services to elementary students who are educable mentally retarded (ER); hearing impaired (H); and neurologically impaired (N), will be placed in schools located in approximately the center of the city so that transportation is kept at a minimal level.

- Programs providing services to secondary students who are educable mentally retarded (ER); hearing impaired (H); and neurologically impaired (N), will be placed in each attendance zone secondary school to the maximum extent possible based upon the numbers of students requiring such services. In the absence of sufficient numbers of students of like functioning levels, students will be placed in schools closest to their attendance zone schools.

- Programs for "low incidence" handicapping conditions providing services to elementary and secondary students who are trainable mentally retarded (TR); speech and language impaired (SL); gifted learning disabled (HL); bilingual handicapped (LB); multiple handicapped (MH); physically or orthopedically handicapped (PH); Rockland Day Treatment Program (E-YDT); Yonkers Learning Center (E-YLC); diagnostic (D), and emotionally disturbed students with non-aggressive behavior (EN), will be placed in schools compatible with the unique needs of the students and the regular education programs within the schools.

- Programs providing speech (Spch) or vision (Vis) resource services for handicapped students whose only special education needs are these services will be provided to the students in their attendance zone schools.

3. Guidelines for the Assignment of Special Education Students into Programs Within Schools

- Transportation shall be provided to special education students where their homes are one and one-half miles from their assigned schools. Such transportation shall not exceed forty minutes of travel time and shall be scheduled to ensure that the school day affords a full day of instruction. Transportation will be provided to any special education students regardless of their residence and school program if the Committee on the Handicapped (COH) determines that the handicapping condition is such that transportation is required.

- Special education students shall have the opportunity to be mainstreamed in accordance with their Individual Education Program (I.E.P.).

- The district shall make every effort to maintain elementary special education students in their assigned K-6 school in order to ensure continuity of program. In the absence of an appropriate program in the assigned elementary school, the special education student may be reassigned to a different school only once. However, a change in placement by the COH overrides this one time only reassignment.

- Special Education students are ensured access to all district extra curricular activities and, in addition, will be provided the necessary transportation.

- Special education students are ensured access to all regular education occupational and magnet programs. Applicants for such programs will be required to complete the application process and to be diagnosed for career options by a professional. The assessment will be made available to the COH for recommendation.

- The district shall make every effort to ensure that the racial/ethnic composition of students of like functioning level student groupings shall reflect the composition of students of like functioning levels on a districtwide basis.

- Special education students will be placed in classes designed to meet their needs and not assigned to integrate schools.

4. Guidelines for the Placement of Limited English Proficient (LEP) Students into Special Education Classes

- Limited English Proficient (LEP) students who are of foreign birth or ancestry, who speak little or no English, and who have scored below the statewide reference point

on an English language proficiency test, and who are referred to the COH for possible Special Education, should be further assessed for language dominance in their native language in order to ascertain the language to be used for further assessment.

- The use of tests for potentially handicapped LEP students will be non-biased and non-discriminatory in accord with the most current research. LEP students will be assessed by diagnosticians proficient in the child' native language, where available. In the absence of such a diagnostician, the student will be provided a translator during the assessment process. In this event, the COH will ensure the use of non-verbal assessment instruments as well. A native language representative will assist the parent/guardian and a student in all aspects of the evaluation, diagnostic, and due process procedures.

- Placement of the LEP child will be made on the student's functioning level and native language proficiency.

G. BILINGUAL EDUCATION

The district shall continue to meet the needs of all Limited English Proficient students under this Order and the FLAME and multilingual programs shall not be considered a substitute for bilingual education.

English proficient Hispanic (monolingual or bilingual) students who are not eligible for the bilingual education program according to the State regulations will be assigned in accordance with the requirements of this Order. Former LEP students who have achieved English language proficiency and/or have been in a program of bilingual education of ESL for three years will be

mainstreamed and provided the same opportunity to participate in all educational aspects of this Order.

Bilingual education and ESL staff will be assigned according to need, i.e., the numbers of LEP students in a building, consistent with the reassignment of students throughout the district.

By June 1, 1986, the Board shall designate where bilingual programs shall be offered at both the elementary and secondary level for the 1986-87 schoolyear and outline how it shall provide language assistance for Hispanic students that wish to enroll in special magnet programs.

H. TRANSPORTATION

Under this Order, transportation will be provided:

- to those students who elect to enroll in Magnet Schools
- to those students who elect to participate in the voluntary student transfer program
- to those students who are required to travel in excess of 1½ miles to their neighborhood school
- to parochial students who live within the City of Yonkers and who travel more than 1½ miles to their school within the City of Yonkers
- to those adults currently enrolled in the Adult Programs located in the old Commerce building when it is relocated to School 31.

When student assignments are established, a consultant transportation firm shall be contracted by the district to develop a safe, reasonable, and manageable transportation program that

will be equitable in terms of burden for both majority and minority students.

I. HUMAN RELATIONS

The district shall implement a human relations program specifically designed to achieve the following objectives:

- To increase alternatives of administrators in analyzing potential inter and intra group problems and promoting group cooperation.
- To improve communications among administrators, teachers, students and community.
- To enhance the awareness of administrators, school personnel and students of diverse cultural backgrounds.
- To increase the training of a cadre of administrators and teaching personnel to facilitate the use of Human Relations experiences with students.
- To provide students with experiences which will assist them in developing and facilitating communication, decision making and problem solving skills.
- To assist students in developing an understanding of their rights and responsibilities as members of the school community.
- To provide an atmosphere in which the school community will be assured of the safe transport of its students to and from school.

The district shall implement the schedule of activities related to human relations, staff development and community education included in Appendix B of this Order.

J. FUNDING

It is anticipated that the necessary funding will be provided by the City of Yonkers, and the Board is to advise the Court forthwith if for any reason it is unable to implement the programs set forth herein because of a lack of adequate funding.

K. ASSURANCES

- The Board shall establish a comprehensive staff development program which will be a component of its ongoing inservice program for teachers and administrators and which will address areas such as racial attitudes, student discipline procedures, academic achievement and performance goal, teaching in a diverse racial/ethnic environment, and integration goals.

- The Board shall provide students equal access to extra-curricular activities. To facilitate such participation, it shall provide appropriate after school transportation for students eligible for transportation.

- In the implementation of this Order, the Board shall provide a comprehensive program of information to the community, including committees of parents and other members of the public who have a particular interest in the issues that may arise during implementation, and to staff in an effort to attain maximum participation in all aspects of the integrative component of this Order including but not limited to media, community meetings, brochures, leaflets,

and other recruitment activities. Plaintiffs-Intervenors shall encourage members of the minority community to support the integrative components of this Order.

- The Board shall ensure that with respect to the use of any desegregation techniques such as school closing or openings, site selections and new construction, and boundary adjustments, its policies and practices shall be consistent with the integrative purpose of this Order, as well as the principles of sound management and administration of the school district.

- The Board shall ensure that this Order is afforded every opportunity for successful implementation through the provision of a comprehensive program of information to the community as well as appropriate human relations programs for staff and students.

- The Board shall ensure that its Code of Disciplinary Standards is publicized and that clear and adequate notification is provided all student, parents, teachers and administrators of such standards and of the non-discriminatory application of these disciplinary procedures.

- The Board shall ensure that the location of transfer of ESL/Bilingual programs in its elementary and secondary schools take place in a manner which will not detract from the objectives of this Order while ensuring that sufficient numbers of students requiring such services are enrolled at each location in order to justify the provision of bilingual or ESL programs. Ample provision shall be made to enable, to the maximum extent possible, students desiring bilingual programs to participate in the dedicated and area attendance magnet programs described elsewhere herein.

- The Board shall ensure that it continue its obligation to fully implement the terms and conditions of its existing agreements with the U.S. Department of Education's Office for Civil Rights and the New York State Education Department which have been designed to ensure compliance with Title VI of the Civil Rights Act of 1964, P.L. 94-142, Section 504 of the Rehabilitation Act of 1973, as amended and the New York Commissioner of Education's Regulations regarding the provision of special education.

- The Board shall ensure, to the maximum extent possible, that racial isolation does not occur within any school building or program operated by the Board.

- The Board shall ensure the provision of remediation to those students scoring below the State Reference Point in the State mandated Pupil Evaluation Program in the basic subject areas of reading and mathematics. In addition, the Board shall encourage the participation of those students in need of remediation in these magnet programs specifically designed to improve student achievement levels in the basic skills areas.

L. MONITORING

Each party, after consultation with the others, shall suggest to the Court one or more candidates for Monitor.

The nominees must be both qualified and willing to serve, and his or her specified compensation shall be borne by the school district. A Monitor shall be empowered to request specific information from the school district relevant to implementation of this Order. She/he shall issue reports to the Court and the

parties assessing different aspects of implementation of the remedy and shall be empowered to make recommendations to the Court with respect to changes she/he believes necessary to make the plan more effective. The Board and the other parties shall make their recommendations within five (5) days from the date of this Order.

Once a Monitor is appointed, one of his/her preliminary tasks shall be assessment of the school district's admissions criteria for the magnet schools and magnet programs. These criteria shall be submitted to the Monitor by June 1, 1986 for those programs that are continuing or will be beginning in September, 1986. Admissions criteria for programs slated to commence in September, 1987 will be submitted to the Monitor by January 15, 1987 and the same procedures will be followed. Any part may at each time offer comments on these admissions criteria.

M. PARENT COORDINATOR

The parent coordinator shall be responsible for working with parents in recruitment and information dissemination and for developing a working relationship with parent organizations in the community. The parent coordinator also shall foster communication with non-English speaking parents. The Superintendent shall notify the Court and all of the parties of the name, credentials and background of the prospective appointee for this position ten (10) days before any appointment is made final and no later than June 1, 1986.

N. REPORTING

By March 16, 1987, the Board of Education shall file with the Court and serve on Counsel for the United States, the NAACP

and the Yonkers Federation of Teachers, a report setting forth the following information for the 1986-1987 school year:

1. Total Student Enrollment, by race, of:

a) the school district, not including Special Education,
b) each organizational pattern in the district not including Special Education,
c) each school facility, not including Special Education students,
d)each Special Education Program (or non categorical/functional level) by race and by age level grouping,
e) each Special Education class together with designation of each student's home school attendance area.

2. The location of each special education class (by classification).

3. The race of the teacher for each Special Education class.

4. The number of students, by race, participating in and/or requesting to participate in voluntary student transfers within the district.

5. The number of students by race, participating in and/or requesting to participate in each of the Magnet Programs and in each of the Magnet Schools.

6. The total faculty, by race and experience level, of the school district.

7. The total faculty, by race and experience level, of each organizational pattern and school facility, excluding Special Education teachers and bilingual teachers.

8. The total school administrative staff, by race, of each school facility.

9. A current and accurate description of all Magnet Programs in operation, and those to begin in September 1987.

10. A description of the district's human relations program.

11. A description of the district's staff development program.

12. The program capacity of each of the district's schools.

O. MISCELLANEOUS PROVISIONS

1. City of Yonkers

The City of Yonkers and the Yonkers Community Development Agency, their officers, directors, agents, employees and successors, shall not intentionally perpetuate or exacerbate racial segregation in the Yonkers public schools by engaging in conduct which blocks or otherwise refuses to permit because of race the development or construction of public or subsidized housing units in violation of Title VIII of the Civil Rights Act of 1968 or the Fourteenth Amendment to the Constitution.

2. Prohibition Against Discrimination

The Board, its members, officers, agents, employees, successors, and all persons in active concert or participation with them shall not discriminate against any student on the basis of

race, color, or national origin in the operation of the Yonkers City School District.

P. MODIFICATIONS

The Board shall notify the United States, Plaintiffs-Intervenors and Defendant-Intervenor of any proposed modification in the plans, programs, or policies described in this Order. Unless the Board shows good cause why the time should be changed, the United States, Plaintiffs-Intervenors and Defendant-Intervenor shall have sixty (60) days from the dates of such notice in which to object to the proposed modification. If the United States, Plaintiffs-Intervenors or Defendant-Intervenor object, no such modification shall be put into effect by the Board without the approval of the Court. Nothing contained herein is intended or shall be construed to prohibit the Board, upon due notice as hereintofore provided, from changing or altering any school boundaries or establishing any new attendance zone, so long as modification, alteration, or new zone neither impedes the integration envisioned under this Order nor violates any law relating to student assignment.

Q. CONTINUING JURISDICTION

During the Board's implementation of the Plan, the Court shall retain jurisdiction of this action to enforce the terms of this Order and for all purposes consistent with attaining the objectives of this Order. Plaintiff or Plaintiff-Intervenors may file a motion with the Court at any time during the period of implementation requesting enforcement or modification of this Order if the Board has failed to make reasonable progress in achieving the integrative objectives of the Plan. In ruling on any such motion, the Court shall base its determination on the totality

of the circumstances, and shall seek to tailor any modification to remedy the specific non-compliance found to exist.

At any time, the Board may if it deems it appropriate to do so, move for a declaration of unitary status.

IT IS SO ORDERED

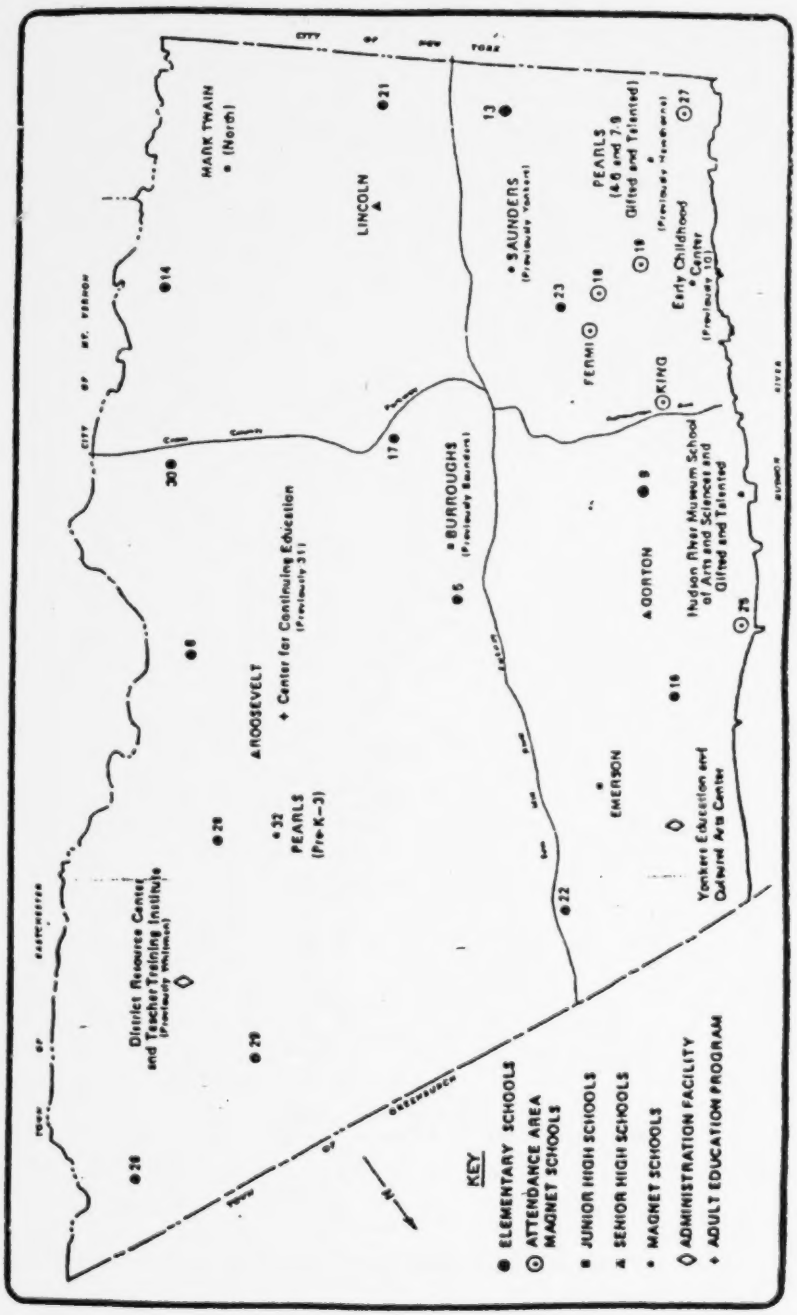
s/
UNITED STATES DISTRICT JUDGE

Dated: New York, New York
May 13, 1986

REMEDIAL ORDER
(EIPI)

DE#666

CITY-WIDE SUMMARY MAP



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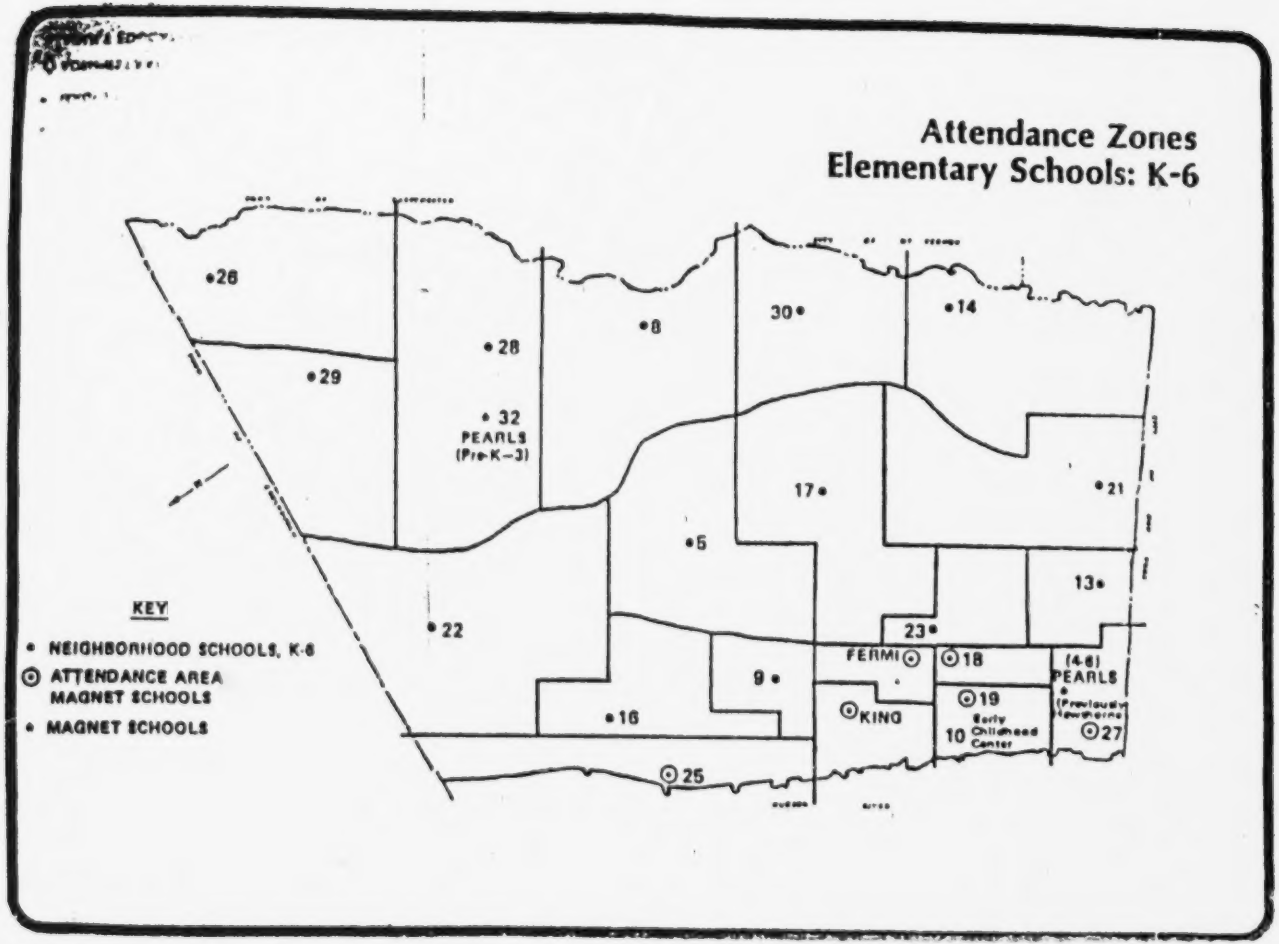
Attendance Zones
Elementary Schools: K-6
KEY
• NEIGHBORHOOD SCHOOLS, K-8
⊙ ATTENDANCE AREA MAGNET SCHOOLS
• MAGNET SCHOOLS
•26
•29
•28
• 32 PEARLS (Pre-K–3)
•8
30•
•14
17•
•21
•5
13•
•22
23•
FERMI ⊙
⊙18
(4-6) PEARLS •
⊙19 Early Childhood Center
10
⊙KING
⊙27
9•
•16
⊙25

REMEDIAL ORDER
(EIPI)

DE#666

Cross-Claim of the Yonkers Board of Education

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

80 Civ. 6761 (LBS)

UNITED STATES OF AMERICA,

Plaintiffs,

—and—

YONKERS BRANCH-NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, et. al.,

Plaintiffs-Intervenors,

—v.—

YONKERS BOARD OF EDUCATION; CITY OF YONKERS; AND YONKERS COMMUNITY DEVELOPMENT AGENCY,

Defendants,

—and—

YONKERS BOARD OF EDUCATION,

Cross-Claimant,

—v.—

THE STATE OF NEW YORK;

THE BOARD OF REGENTS OF THE STATE OF NEW YORK; and MARTIN C. BARELL, R. CARLOS CARBALLADA, ADELAIDE L. SANFORD, WILLARD A. GENRICH, EMLYN I. GRIFFITH, JORGE L. BATISTA, LORA BRADLEY CHODOS, LOUISE P. MATTEONI, EDWARD MEYER, FLOYD S. LINTON, SALVADORE SCLAFINI, MIMI LEVIN LIEBER,

SHIRLEY C. BROWN, NORMA GLUCK, THOMAS R. FREY, and JAMES MCCABE, SR., in their official capacities as members of the Board of Regents;

THE DEPARTMENT OF EDUCATION of the State of New York;

THOMAS SOBOL, in his official capacity as Commissioner of Education of the State of New York;

MARIO CUOMO, in his official capacity as Governor of the State of New York;

—and—

THE URBAN DEVELOPMENT CORPORATION of the State of New York and VINCENT TESE, as Director of the Urban Development Corporation,

Cross-Defendants.

CROSS-CLAIM OF THE YONKERS BOARD OF EDUCATION

Preliminary Statement

1. On November 20, 1985, this Court found that Yonkers and its public school system were intentionally segregated by race, and that the Yonkers Board of Education ("Yonkers Board") and the City of Yonkers ("City") were jointly liable for racial segregation in the Yonkers public schools. 624 F.Supp. 1276 (S.D.N.Y.). Subsequently, and pursuant to the Order of this Court, the Yonkers Board proposed an "education improvement plan" ("EIP" or the "Plan"). The Plan was adopted and ordered by this Court, with certain modifications, on May 13, 1986.

2. The actions and inactions of the State of New York and the other cross-defendants have played a significant role in creating and maintaining the racial segregation in Yonkers which led to the 1985 decision of this Court. In addition, the

cross-defendants have failed and refused to fulfill their responsibility to help a alleviate such segregation and its effects, despite requests for assistance from the Yonkers Board. Such participation by the cross-defendants is necessary in order to achieve long-term, effective desegregation in the Yonkers Public Schools. Accordingly, the Yonkers Board brings this claim for declaratory and injunctive relief in order to fulfill its statutory and constitutional obligations to operate its school system free of the effects of racial segregation as found by this Court. This cross-claim seeks this Court's judgment and order requiring cross-defendants to participate in the implementation and funding of the Plan as modified or extended by the Court to include remedial and other educational measures necessary to achieve a system of public education in the City of Yonkers which meets federal and state constitutional requirements.

Jurisdiction

3. This cross-claim arises under 42 U.S.C. §§ 1981, 1983, 1985, 1988 and 2000d; the Thirteenth and Fourteenth Amendments to the Constitution of the United States; and Article VI, Clause 2 of the Constitution of the United States (the Supremacy Clause). This Court has jurisdiction over the parties and the subject matter of this Cross-Claim under 28 U.S.C. §§ 1331, 1343(3) and (4), 2201, and 2202.

Parties

4. Cross-claimant Yonkers Board of Education ("Yonkers Board") is a municipal corporation established under the laws of New York State and subject to the control of the New York State Board of Regents and the Commissioner of Education. The Yonkers Board is an agent of the State of New York, is charged with the responsibility of providing education to public school children in the City of Yonkers, and is fiscally

dependent upon the State of New York and the City to fund the operation, maintenance, and facilities of the Yonkers Public Schools. *See* New York Constitution Article V, Section 4; N.Y. Educ. Law, §§ 305, 2551, 2554, 3602, and 3602a (McKinney 1981). This Court, by its November 20, 1985 decision, has found that the Yonkers Public Schools are "racially segregated" and "unequal in the quality of educational opportunity afforded to students in the schools," and that the Yonkers Board "is liable for the racial segregation of Yonkers' public schools." 624 F. Supp. at 1530, 1537.

5. Cross-defendant State of New York ("State") is entrusted and vested with the central responsibility for education in New York State. The legislature of cross-defendant -State of New York is required under Article XI, Section 1 of the New York State Constitution to provide for the maintenance and support of the system of free common schools wherein all the children of the State may be educated. The educational program for all the children of the State of New York must comport with the requirements of the United States Constitution and the Constitution of the State of New York. The State receives and has received federal financial assistance for education and for desegregation-related activities.

6. Cross-defendants Martin C. Barell, R. Carlos Carballada, Adelaide L. Sanford, Willard A. Genrich, Emlyn I. Griffith, Jorge L. Batista, Lora Bradley Chodos, Louise P. Matteoni, Edward Meyer, Floyd S. Linton, Salvatore J. Sclafini, Mimi Levin Lieber, Shirley C. Brown, Norma Gluck, Thomas R. Frey, and James W. McCabe, Sr., are sued in their official capacities as members of the Board of Regents ("State Board"). The State Board is the head of the cross-defendant Department of Education, and its members have the authority to appoint and remove the Cross-defendant Commissioner of Education. The State Board is responsible for exercising legislative functions concerning the State's educational system, for determining its educational policies, and for establishing rules for carrying into effect the laws and policies of the state

relating to education. New York State Constitution, Article V, Section 4, N.Y. Educ. Law § 207 (McKinney 1981).

7. Cross-defendant Thomas Sobol is sued in his official capacity as Commissioner of Education of the State ("Commissioner"). Under New York law, the Commissioner is the Chief Executive Officer of the system of public education in New York State, and the Chief Administrative Officer of the Department of Education. The Commissioner has the responsibility for supervising all public schools in New York and for advising and guiding the school officers of all school districts, including Yonkers, as to their duties and as to the management of their respective school systems. The Commissioner has the power, *inter alia*, to enforce general and specific laws relating to the educational system and the rules of the Board of Regents, to hear complaints and to institute proceedings concerning racial segregation, to issue desegregation orders, to redraw district lines, and to withhold state funds from any school system which willfully disobeys any provision of law or any decision, order or regulation of the Commissioner of Education. N.Y Educ. Law §§ 305, 306, 308, 309, and 310, (McKinney 1981).

8. Cross-defendant Mario Cuomo (the "Governor") is sued in his official capacity as Governor and Chief Executive Officer of the State of New York. Pursuant to Article VII, Sections 1 and 2 of the New York Constitution, the Governor has the responsibility to include in his annual budget sufficient funds for providing for a public system of education in the State of New York which comports with federal and state constitutional requirements. The cross-defendants described in Paragraphs 5-8 above will be referred to collectively as the "Education Cross-Defendants".

9. Cross-defendant Urban Development Corporation ("UDC"), was established under Chapter 174 of the Laws of New York, 1968, by the New York State Legislature, and was charged with the responsibility, *inter alia*, of increasing the availability of dwelling accommodations for persons and fam-

ilies of low income. At the time of the events described below, the UDC had the power to override local zoning requirements to carry out its responsibilities. N.Y. Unconsol. Laws §§ 6254, 6265 and 6266. Cross-defendant Vincent Tese is sued in his official capacity as director of the UDC.

Factual Allegations

10. In its remedial order dated May 13, 1986, this Court retained jurisdiction to enforce the terms of its Order and "for all purposes consistent with attaining the objectives of this Order." In ordering the implementation of the Plan, this Court directed the Yonkers Board to advise the Court if for any reason it was unable to implement the Plan because of lack of adequate funding. 635 F. Supp. at 1553, 1551.

11. Pursuant to this Court's order, the Yonkers Board has worked to implement the Plan. This experience has revealed the necessity for additional educational improvements in order to achieve effective and *lasting* desegregation in Yonkers. For example, as the Yonkers Board has begun to integrate minority schoolchildren, some of whom have significant educational needs, into previously all-white classrooms, it has become apparent that additional remedial education, staff training, and teacher resources are needed in older to make desegregation work.

12. Education in New York, including desegregation and the provision of equal educational opportunity, is a state function for which the State and its agencies are responsible. For example, Cross-defendant Board, in a policy statement issued in 1960, urged the desegregation of New York State's public schools. In 1963, Cross-defendant Commissioner called upon educators in the State of New York to act firmly and with all possible speed to eliminate segregation, *de jure* or *de facto*, in the public schools of the State of New York. In that same year, Cross-defendant Commissioner requested all school

boards in New York State to notify the Department of Education of those schools in their respective systems having a black enrollment exceeding 50%, and the State Education Department issued guidelines for desegregation of the public schools. *See* 624 F. Supp. at 1468.

13. The Education Cross-defendants have long been aware of school segregation in Yonkers. In 1969, for example, Cross-defendant Commissioner identified the Yonkers school system as one of the most racially isolated school systems in the State.

14. Notwithstanding the responsibilities of the Cross-defendants and their recognition of school segregation in Yonkers, the Cross-defendants have contributed to such segregation and have injured the Yonkers Board and its schoolchildren through a continuing pattern of actions and failures to act. As discussed further below, this pattern has included, *inter alia*: a) enacting a 1969 statute, later found to be unconstitutional, which intentionally limited and discouraged desegregation efforts throughout the State, including Yonkers (¶¶ 15-22); b) impairing and discouraging desegregation and encouraging segregation throughout the State, including Yonkers, through other legislative and administrative actions (¶¶ 23-30); c) impeding desegregation efforts in Yonkers specifically through funding limitations and other conduct (¶¶ 31-38); and d) sponsoring segregated subsidized housing in Yonkers which contributed to school segregation (¶¶ 39-43).

State enactment of legislation impeding school desegregation

15. In 1969, the State enacted a law which prohibited State education officials and appointed school boards, including the Yonkers Board, from assigning students or establishing, reorganizing or maintaining school districts, school zones or

attendance units for the purpose of achieving racial equality in attendance. Chapter 342 of the Laws of 1969, Education Law § 3201, ¶ 2.

16. The enactment of Chapter 342 of the Laws of 1969 was a clear and unambiguous attempt by the State to thwart efforts by local school systems to eliminate racial imbalance in the schools.

17. The statute was enacted despite objections from school districts, including the Yonkers Board, and despite express reservations as to its constitutionality.

18. The statute, by prohibiting the implementation of plans designed to alleviate racial imbalance in school systems such as Yonkers, created a single exception to the broad supervisory powers of the State Commissioner of Education over local public education.

19. The statute created a clearly racial classification, treating educational matters involving racial criteria differently from other educational matters and making it more difficult to deal with racial imbalance in the public schools, all in violation of the Fourteenth Amendment.

20. Although the statute was determined to be a violation of the Fourteenth Amendment by the United States Supreme Court in 1971, no action was subsequently taken by the State to repeal or modify the statute since that time and the unconstitutional statute continues to be part of the New York State education laws.

21. The statute had the effect of slowing affirmative efforts within the State to reduce racial segregation.

22. The statute was intended to have and did have the effect of continuing segregation in the schools in New York State and of significantly encouraging and involving the State of New York in racial discrimination.

State conduct impeding State desegregation efforts and discouraging desegregation in Yonkers

23. Upon information and belief, in addition to the adoption of Chapter 342 of the Laws of 1969, the State Legislature took direct and indirect action to limit and impede efforts of the State Board, the Commissioner, the New York State Department of Education, and local school districts, including Yonkers, to achieve integration in the public schools of the State of New York. Such action included, *inter alia*: (a) adopting a joint resolution calling for a federal constitutional convention to amend the United States Constitution to ban the reassignment of students on the basis of race to achieve integration; (b) even after Chapter 342 was declared unconstitutional, enacting another law (subsequently vetoed by the Governor) which sought to impose a moratorium on reassignment of students to achieve racial balance, and was no different in substance from Chapter 342; (c) instituting a policy of interviewing candidates for appointment and reappointment to the Board in order to ascertain the candidates' views on busing to achieve racial integration and selecting as Regents only those candidates who were opposed to busing; (d) denying renewal of appointments to the Board to certain regents who had supported busing to achieve racial integration in the public schools; (e) refusing to adopt legislation proposed by the Commissioner and by a State-appointed commission to facilitate school district reorganization where necessary to remedy school segregation; (f) maintaining the status of Yonkers and other districts as fiscally dependent districts, despite the recommendation of the Commissioner that such status be changed because it impeded effective desegregation; (g) refusing to take any action to implement the recommendations of a State-appointed commission that many school districts in the State, including Yonkers, should be compelled by the legislature to desegregate their schools; and (h) eliminating the State Education Department's Racial Balance Fund over the objections of the Commissioner.

24. In 1969, Ewald B. Nyquist was appointed Commissioner' of Education by the State Board. Upon information and belief, Commissioner Nyquist during his term of office sought to pursue affirmative measures to eliminate segregation in the public schools including, where indicated, the reassignment or busing of students to accomplish racial integration.

25. On November 19, 1976, the State Board terminated Ewald B. Nyquist as the Commissioner of Education. Upon information and belief, one reason for his termination was his strong policy of promoting affirmative measures, including busing where indicated, for integration of public schools in the State of New York.

26. Upon information and belief, following the termination of Commissioner Nyquist, there have been few, if any, orders issued by the Commissioner's Office for racial integration of the respective school districts, whereas previously the Commissioner of Education in implementing the State Board's policy issued such integration orders.

27. Upon information and belief, members of the State Board took other action, in addition to the termination of Commissioner Nyquist, which limited and impeded efforts to achieve integration in the public schools of the State of New York. Such actions included, *inter alia*, adopting policy statements and otherwise seeking to interfere with and discourage desegregation enforcement efforts by the Commissioner during the 1970s.

28. Upon information and belief, the aforestated actions and conduct had a chilling effect on the initiation of programs and plans for racial integration of the public schools in the State of New York, including the Yonkers Board.

29. Upon information and belief, the aforestated actions and conduct encouraged and fostered opposition by local public officials and local school boards to racial integration, including the opposition of local public officials in Yonkers.

30. The State itself has recognized the negative effects of many of the aforesaid actions and conduct. In 1969, the Governor and the State Board created the New York State Commission on the Quality, Cost and Financing of Elementary and Secondary Education, known as the Fleischmann Commission. Among its other responsibilities, the Fleischmann Commission was charged with studying the problems caused by years of discrimination and segregation in New York schools. In its 1972 report, among its other conclusions, the Fleischmann Commission severely criticized the State's conduct in enacting Chapter 342, in eliminating the Racial Balance Fund, in providing inadequate funding even when the Fund was in existence, and in refusing to accept the legislation proposed by the Commissioner in 1970 to facilitate desegregative school district reorganization. The Fleischmann Commission specifically concluded that such conduct contributed to the failure of the public schools in New York to make satisfactory progress towards racial integration.

Additional State conduct limiting school desegregation in Yonkers

31. By resolution dated May 28, 1970, the Yonkers Board instructed the Yonkers Superintendent of Schools to work with the State Education Department in formulating plans to ameliorate the problem of racial imbalance in the Yonkers public schools. Part of the basis for this Court's finding of liability against the Yonkers Board was the Board's failure to take effective action in 1970-71 to fully develop and implement such plans. At the same time, however, the Education Cross-defendants also failed to take such action with respect to school desegregation in Yonkers, despite the fact that they had participated with Yonkers school officials in designing proposed desegregation efforts, were aware of school segregation in Yonkers, and had the authority and responsibility to take action. In fact, the Education Cross-defendants elimi-

nated the one source of State funding for even the modest desegregation efforts underway in Yonkers by cutting off funding for the Racial Balance Fund in 1972.

32. In 1975, the Yonkers Board advised the Commissioner of Education that the Yonkers school district had undertaken a project to reduce minority group isolation in the Yonkers public schools and that a task force for quality education had been created to integrate the public schools. By resolution of the Yonkers Board adopted October 9, 1975, the task force for quality education was established to develop an integration plan; at the same time, the Yonkers Board sought funding to finance the position of "planning coordinator" and to obtain resources and staff from the State Education Department to implement the plan to reduce racial segregation in the Yonkers public schools.

33. Despite its continuing knowledge of the problem of racial isolation in Yonkers, and despite the fact that the City of Yonkers was suffering from severe financial difficulties and a fiscal crisis which culminated in the Emergency Financial Control Act of 1976, Chapter 488, Laws of 1976, the State Education Department did not make available the limited funding requested by the Yonkers Board for formulating a plan of integration.

34. In 1976-77, the Emergency Fiscal Control Board, controlled by the State, required the Board to implement an additional $9.7 million in budget reductions. This State-approved reduction, which was in addition to 1975-76 City-imposed budget cuts of approximately $6 million, represented approximately half of the City's total budget deficit.

35. These budget cuts had the effect of imposing on the school system a greater than *pro rata* share of the City's financial difficulties. This further limited the ability of the Yonkers Board, which in 1975 was balancing fiscal and desegregation priorities, to undertake effective desegregation efforts.

36. Notwithstanding the negative impact of these actions and their recognition of the continuing problem of racial imbalance in the Yonkers public schools, the Education Cross-defendants repeatedly denied requests by the Yonkers Board for financial assistance to continue Yonkers' efforts to promote equal educational opportunity, except for one small grant in 1976, and did not provide for any supplemental funding to ameliorate or reduce the effects of the financial constraints imposed by the Emergency Fiscal Control Act of 1975.

37. After 1976, and even after this Court's order of May 13, 1986, the Education Cross-defendants have continued to deny requests by the Yonkers Board for assistance to implement effective desegregation efforts.

38. From at least 1969 through the present, with knowledge of school segregation in Yonkers and of the Yonkers Board's actions and inactions with regard to desegregation, the cross-defendants failed to take any effective action to promote desegregation in Yonkers, and continued to encourage and perpetuate the segregated structure of education as found by this Court in the Yonkers Public Schools.

State sponsorship of segregated subsidized housing in Yonkers

39. This Court has previously found that the City of Yonkers was a state actor in unlawfully contributing to a condition of racial segregation in housing in the Yonkers community, which segregation in turn had a segregative impact on the Yonkers public schools. 624 F. Supp. at 1534, 1542-45.

40. This Court has previously determined that the Urban Development Corporation contributed to the creation and maintenance of 1,800 units of segregated subsidized housing. 624 F. Supp. at 1313-14.

41. This Court specifically found that despite its authority to override local zoning laws and its initial preference for scattered-site housing, UDC deferred completely to the City's views as to site selection and, in cooperation with the City, sponsored approximately 1,800 units of segregated subsidized housing in racially isolated southwest Yonkers. *See* 624 F. Supp. at 1317-27.

42. The Yonkers Board specifically objected to this segregative placement of the UDC-sponsored subsidized housing.

43. UDC sponsorship of the approximately 1,800 housing units in racially isolated southwest Yonkers exacerbated residential and school segregation in the City of Yonkers and further contributed to the isolation of minority citizens in Yonkers.

Claim for Relief

44. As a result of the conduct complained of in paragraphs 1 to 43 above, the vestiges of segregation persist today in the Yonkers public schools. Notwithstanding the desegregation plan approved in this Court's Order dated May 13, 1986, and the Yonkers Board's efforts to implement that plan, additional measures are necessary to achieve stable, effective school desegregation in Yonkers.

45. As described above, the cross-defendants named herein and their predecessors and instrumentalities have denied and deprived the Yonkers Board and the schoolchildren of Yonkers of their federal and State constitutional and legal rights, privileges and immunities, as follows: (a) by such conduct as terminating the sole source of State funds to assist districts seeking to remedy racial isolation, enacting Chapter 342, and appointing and removing members of the State Board on the basis of their attitude toward busing, cross-defendants encouraged segregation and impeded the efforts of those Yonkers officials who sought to remedy the unconsti-

tutional segregation found by this Court; (b) by such conduct as failing to assist the Yonkers Board in its voluntary desegregation efforts, continuing to fund regular education programs in Yonkers, and failing to take any affirmative action to alleviate school segregation in Yonkers, despite their authority and responsibility to do so, cross-defendants intentionally tolerated, condoned, supported, and perpetuated the school segregation in Yonkers found by this Court, with full knowledge of the consequences of their actions; (c) by sponsoring segregated subsidized housing, by acceding to Yonkers officials' choices of sites for subsidized housing it knew to be segregated, and by declining to exercise its power to override local zoning ordinances to create integrated housing, cross-defendant UDC was a full participant in the illegal segregation of 1800 housing units in Yonkers, contributing to school segregation.

46. The conduct of the cross-defendants as described above has injured the Yonkers Board by impairing its ability to educate Yonkers' students effectively and by impeding its ability to fulfill its constitutional obligations to operate a school system free from racial discrimination and its effects.

47. The conduct of the cross-defendants as described above has violated the equal protection guarantees and prohibitions against discrimination of the Thirteenth and Fourteenth Amendments to the U.S. Constitution and 42 U.S.C. § 1981, 1983, 1985, 1988 and 2000d, and has violated Article VI, Clause 2 of the Constitution of the United States (the Supremacy Clause).

Prayer For Relief

WHEREFORE, Cross-Claimant Yonkers Board respectfully requests that this Court:

a. Enter an order pursuant to 28 U.S.C. § 22C1 declaring that Cross-Defendants and their predecessors created, main-

tained, continue to perpetuate, and have failed to fulfill their affirmative obligations to dismantle the racially dual system of public education in the City of Yonkers and all its vestiges and effects as found by this Court, in violation of the Constitution of the United States and federal law;

b. Enter an order requiring the Cross-Defendants identified herein, their successors in office, agents, employees, and all persons in active concert or participation with them, to cease their illegal and unconstitutional conduct and to help implement and fund a plan to correct the violations referred to above. The Cross-Defendants should be ordered to participate in the existing plan, and in educational programs over and above those previously ordered, which are necessary to eradicate the effects of segregation found by this Court in the Yonkers Public Schools to the maximum extent practicable and as soon as possible;

c. Enter an order pursuant to 42 U.S.C. § 1988 allowing Cross-Claimant its costs and reasonable attorneys' fees in prosecuting this Cross-Claim; and

d. Grant such other and further relief as this Court finds just and proper.

Respectfully submitted,

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Second Amended Complaint of the NAACP

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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80 Civ. 6761 (LBS)

UNITED STATES OF AMERICA,

Plaintiff,

—and—

YONKERS BRANCH, NAACP, et al.,

Plaintiff-Intervenors,

—vs.—

CITY OF YONKERS, YONKERS COMMUNITY DEVELOPMENT AGENCY: YONKERS BOARD OF EDUCATION,

Defendants,

—and—

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, SAMUEL PIERCE, SECRETARY,

Added-Defendants,

—and—

THE STATE OF NEW YORK; MARIO CUOMO, as GOVERNOR OF THE STATE OF NEW YORK; THE BOARD OF REGENTS OF THE STATE OF NEW YORK; MARTIN C. BARELL, R. CARLOS CARBALLADA, ADELAIDE L. SANFORD, WILLARD A. GENRICH, EMLYN I. GRIFFITH, JORGE L. BATTISTA, LORA BRADLEY CHODOS, LOUISE P. MATTEONI, EDWARD MEYER, FLOYD S. LINTON, SALVADORE

SCLAFINI, MIMI LEVIN LIEBER, SHIRLEY C. BROWN, NORMA GLUCK, THOMAS FREY and JAMES MCCABE, SR., in their official capacities as members of the State Board of Regents; THE DEPARTMENT OF EDUCATION OF THE STATE OF NEW YORK; THOMAS SOBOL, as COMMISSIONER OF EDUCATION IN THE STATE OF NEW YORK and THE URBAN DEVELOPMENT CORPORATION of the STATE OF NEW YORK and VINCENT TESE, as Director of the Urban Development Corporation,

Added-Defendants.

SECOND AMENDED COMPLAINT

I. *PRELIMINARY STATEMENT*

1. On July 1, 1981, this court granted the plaintiff intervenors' Motion to Intervene in this lawsuit as against defendants City of Yonkers, Yonkers Community Development Agency and Yonkers Board of Education (hereinafter local defendants or City or YBE).

2. In February 1982, this court granted plaintiff-intervenors leave under F.R.Civ.P. 15 to file their Amended Complaint adding defendants United States Department of Housing and Urban Development and Secretary Samuel Pierce as parties hereto.[1]

3. Plaintiff-Intervenors expressly incorporate paragraphs 1-36 of their Complaint and 37-59 of their First Amended Complaint as if fully re-written herein.

4. On November 20, 1985, after lengthy proceedings, this court held local defendants liable for violating the constitu-

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[1] Attached hereto are Intervenors' Complaint of March 1981 and their Amended Complaint of December 1981; leave to file the latter was granted in February 1982.

tional rights of intervenors and the class of minority persons they represent by intentionally fostering racial segregation both in the residential and schooling patterns of the City of Yonkers. Specifically, local defendants were held jointly liable for creating a condition of racial segregation in the city's public schools. *See*, 624 F.Supp. 1276 (S.D.N.Y. 1985). The City was found liable for fostering housing segregation.

5. As demonstrated by proofs offered at trial, the actions and inactions of the State of New York, through its several agencies and instrumentalities responsible for education and housing contributed to the creation and perpetuation of unlawful racial segregation in Yonkers.

6. Though cognizant of such racial segregation, proposed added-defendants and their predecessors in office failed to discharge their legal duty to eliminate such segregation and its effects. Instead, through acts and omissions more fully detailed below, proposed added-defendants exacerbated such segregation.

7. In so acting and omitting to act, proposed added state defendants violated the constitutional rights of members of intervenors' class and should now be required, after appropriate proceedings, to participate in the remedy of such violations.

II. *JURISDICTION*

8. This second amended complaint arises under 42 U.S.C. 1981, 1988 and 2000d; the Fourteenth Amendment to the Constitution of the United States and Article VI, Clause 2 of the United States Constitution. This district court has jurisdiction over proposed added state defendants and the subject matter through 28 U.S.C. secs. 1331(a), 1343(3) and (4), 2201 and 2202.

III. *PARTIES*

9. Plaintiff-Intervenors Yonkers Branch, NAACP, et. al. are (a) a civil rights organization chartered by the national office of the NAACP specifically, *inter alia*, "to remove all barriers of racial discrimination through democratic processes; to seek enactment and enforcement of federal, state and local laws securing civil rights . . . [and] to educate persons as to their constitutional rights and to take all lawful action to secure the exercise thereof . . . ". Constitution of the NAACP, Article II, Statement of Objectives, and (b) the class of minority persons residing in Yonkers attending or eligible to attend its public schools and residing in or eligible to reside in assisted housing. This court has previously granted this class legal standing herein and recognized this as a class action. It has also recognized the organizational standing of the local Branch of the NAACP to pursue the organizational objectives outlined above.

10. Added-defendant State of New York ("State" hereafter) has constitutional and statutory responsibility for public education in the State of New York. The State of New York must insure that each school district complies with the requirements of the United States Constitution and the Constitution of the State of New York. The State both receives and distributes federal funds for educational and desegregation-related purposes. It also allocates substantial sums for the purpose of assisting local school districts like Yonkers.

11. Added-defendant Mario Cuomo (the "Governor" hereafter) is sued in his official capacity as Chief Executive Officer of the State of New York, a position he has held since January 1983. Under Article VII, Sections 1 and 2 of the New York Constitution, the Governor must include in each annual state budget funds sufficient to provide for a lawfully operated system of public education in the State of New York.

12. Added-defendants Barell, Carballada, Sanford, Genrich, Griffith, Batista, Chodos, Matteoni, Meyer, Linton,

Sclafini, Lieber, Brown, Gluck, Frey and McCabe, Sr., are sued in their official capacities as members of the State Board of Regents ("State Board" hereafter). The State Board directs the State Department of Education. Its members appoint and remove the Commissioner of Education and are authorized to exercise legislative functions concerning the State's educational system. The State Board also determines and announces educational policies for local school districts and establishes rules and regulations for enforcing state policies in the area of education.

13. Added-defendant Thomas Sobol is sued in his official capacity as Commissioner of Education of the State of New York ("Commissioner" hereafter). Appointed by the State Board, the Commissioner serves as the Chief Executive Officer for the system of public education in the state. He also administers and is responsible for the Department of Education. Along with this latter agency, the Commissioner supervises all public schools in New York and advises local school officers, including those in Yonkers, with respect to their duties under state law and regulation. The Commissioner has the specific power to enforce laws relating to the educational system and the rules and regulations of the State Board. Particularly, the Commissioner may issue desegregation orders; re-draw district lines and withhold state and federal funds from any school district which willfully disobeys any provision of state law or any decision, order or regulation of the Commissioner.

14. Added-defendant Urban Development Corporation ("UDC" hereafter) was created in 1968 by act of the State Legislature. Among its responsibilities was the provision of housing for those of limited means in a non-segregative manner. To this end, the UDC was granted the power to over-ride local zoning laws.

15. Added-defendant Vincent Tese is sued in his official capacity as Director of the UDC.

IV. *FACTUAL AVERMENTS*

15 The State; the State Board and its members and the Commissioner are responsible for education throughout the State of New York.

16. In 1960, the State Board issued a policy statement urging the desegregation of New York State's public schools. In 1963, then Commissioner James Allen directed education leaders to eliminate segregation, however caused, from the public schools. That same year, he requested school boards to identify those schools having a black enrollment in excess of 50% and to develop plans to integrate same. At the same time, the Education Department issued guidelines for the desegregation of the state's s public schools.

17. Added-defendants, acting in their supervisory authority over local school districts, became aware of school segregation in Yonkers in the 1960's.

18. Despite this awareness, the added-defendants have taken no action to require Yonkers to comply with state mandates and federal law with regard to school segregation.

19. Instead, through a series of acts and omissions as outlined below, added-defendants have encouraged the maintenance of segregated schools in Yonkers; withheld support at those rare moments that Yonkers' officials have sought state assistance in remedying extant school segregation and failed to enforce state and federal requirements as against Yonkers.

20. In 1969, New York State enacted Chapter 342, Education Law sec. 3201 Para. 2. This enactment prohibited state educational officials and appointed local school boards, including Yonkers', from assigning students or establishing, organizing or maintaining school districts, school zones or attendance lines for the purpose of achieving racial balance.

21. This legislation intentionally created a racial classification, removing from local school boards a power tradi-

tionally within their authority, thus making it more difficult for such school districts to ameliorate racial imbalance in public schools, in violation of the Fourteenth Amendment.

22. Chapter 342 was intended by the State legislature to impede and thwart both the efforts of the State Commissioner and the Board of Regents and those of local school districts in redressing racial imbalance and unequal educational opportunity.

23. After adopting Chapter 342, the State Legislature took other actions to impede and thwart state and local efforts to achieve racial balance and integration. Such actions created and contributed to a public atmosphere hostile to racial integration, thus making it more difficult for even well-intended local school districts to address the issue of racial imbalance and segregation.

24. Specifically, the State Legislature (a) adopted a joint resolution calling for a constitutional convention to bar the re-assignment of students to achieve racial integration; (b) sought to re-vitalize the unconstitutional Chapter 342 by passing legislation imposing a moratorium on the reassignment of students to achieve racial balance; (c) instituted a policy and custom of interviewing candidates for appointment and reappointment to the State Board so as to ascertain each candidates' view on busing to achieve racial integration and then selecting only those who stated their opposition to busing; (d) denied reappointment to certain State Board members who had supported busing as a means of achieving racial integration; (e) failed to adopt legislation proposed by the Commissioner and a state-appointed commission to facilitate school district reorganization when necessary to remedy school segregation; (f) maintained the status of Yonkers as a fiscally dependent school district, despite the recommendation of the Commissioner that such status be changed, in part because its continuation impeded desegregation; (g) failed to implement the recommendations of a State-appointed commission that many school districts, including Yonkers, should

be compelled to desegregate their public schools and (h) over the objection of the Commissioner, eliminated the State Education Department's Racial Balance Fund.

25. Under the strong influence of the State legislature and in large part because of his advocacy of school desegregation, in November 1976, the State Board discharged Ewald B. Nyquist as Commissioner of Education.

26. While Dr. Nyquist had sought to continue state enforcement actions, following his termination, there have been few orders issued by the Commissioner requiring racial integration of school districts.

27. This policy of "non-interference" in local school districts has been implemented with the support of the majority of the Board of Regents. That Board has issued policy statements since 1970 which have effectively removed state pressure upon local school districts to adopt desegregative measures and have assured, on the contrary, that the state would not act to insure desegregation or equal educational opportunity.

28. With specific regard to Yonkers, responding to state direction, in May 1970, the Yonkers School Board instructed its Superintendent to work with the State Education Department to formulate plans to lessen racial imbalance in its schools.

29. Shortly thereafter, representatives of the State Education Department learned that Yonkers would not implement any effort to ameliorate racial imbalance in part because of the racially-predicated public opposition to any such steps.

30. In fact, Yonkers initiated minimal actions to curb racial imbalance and such imbalance worsened through the 1970's.

30. In the fall of 1975, the Yonkers Board advised the Commissioner of Education that it had created a Task Force for Quality Education to study minority group isolation and to recommend means of correcting this condition. The

Yonkers Board of Education sought both financial and technical assistance from the State Department in this effort.

31. Despite knowledge of the condition of racial segregation in Yonkers' schools, the State Department of Education failed to provide such assistance to Yonkers.

32. In 1977 and 1978, Yonkers officials refused to implement either the recommendations of the Task Force for Quality Education or those of its own Superintendent, Joseph P. Robitaille. The Yonkers Board failed to act in part for racial reasons and did not adopt any alternative to these recommendations which would have ameliorated the extant racial imbalance.

33. Notwithstanding its knowledge of the ongoing racial segregation in Yonkers and its own responsibility to supervise and insure the lawful operation of local school districts, the State, acting through the Commissioner and the State Board, took no actions against the Yonkers Board of Education.

34. On information and belief, between 1976 and the present, Yonkers officials have requested specific desegregation related assistance from the state education leaders. This has not been forthcoming.

35. In part because of the failure of the State; the Commissioner and the State Board and its members to take responsible action in light of their collective knowledge of racial segregation in Yonkers, members of the plaintiff-intervenors' class and the Yonkers Branch, NAACP and its members suffered racial segregation and unequal educational opportunity.

36. Such failures to act on the part of state educational officials were and continue to be motivated by their collective desire to placate political forces opposed to racial integration and, in this manner, these state actors have adopted the pernicious racial motivations of those opposed to state action to curb impermissible, state-sponsored segregation.

37. Through the persistent pattern of failure to act in discharge of state duties, the state defendants substantially contributed to both the creation and maintenance of racial segregation and unequal educational opportunity for members of intervenors' class.

38. Added-defendant Urban Development Corporation sponsored some 1800 units of assisted housing in southwest Yonkers between 1970-1975.

39. In the process of assisting City of Yonkers' officials in the provision of such housing, officers and agents of the UDC learned:

(a) of the profound racially-based opposition to the provision of assisted housing outside areas of minority residential concentration;

(b) of the complicity of local political officials with this racially-based opposition and

(c) of the numerous suitable sites for the location of such assisted housing *outside* areas of minority concentration.

40. Notwithstanding the purposes of the UDC, which included the provision of assisted housing in a non-segregative manner, and its statutorily-granted power to override local zoning ordinances, the UDC in Yonkers:

(a) specifically renounced its own authority to override local zoning barriers;

(b) acceded full control of the site selection process to local officials themselves beholden to racial politics;

(c) complied with the segregative site selections made by these local officials, despite full knowledge of their predictably segregative impacts and

(d) provided state and federal monies to such housing projects. thereby making same feasible of construction,

41. The effects of the UDC's actions were highly segregative and this contributed to both residential and school segregation in Yonkers.

42. UDC officials acted with full knowledge of the predictable effects of their contribution to Yonkers and willfully assisted Yonkers' municipal officials in the expansion and extension of racial segregation.

43. Since 1975, New York State has adopted several programs to assist in the provision of subsidized housing. Each of these programs favors the allocation of state resources in a manner which further exacerbates the segregation of low-income and minority families and disfavors the provision of new housing opportunities in an integrative manner.

44. Since 1975, the State has taken no action to remedy the housing and school segregation caused by the actions set forth above.

V. *CAUSES OF ACTION*

45. By the actions described above, the added state defendants have intentionally violated the constitutional rights of minority citizens and residents of Yonkers, New York, contributing to the racial segregation of that City's neighborhoods and schools, and denying to them equal protection under the law.

46. By the omissions described above, the added state defendants have intentionally failed to discharge their supervisory obligations in a manner consistent with the laws of the State of New York and the Constitution of the United States and its laws. Such failures have been motivated, in large measure, by racial prejudice and the desire of state officials to placate majority sentiment. Such omissions have caused increasing racial segregation and unequal educational opportunity in violation of the Fourteenth Amendment to the Constitution.

VI. *PRAYER FOR RELIEF*

WHEREFORE, plaintiff-intervenors pray that this court:

(a) Enter an order pursuant to 28 U.S.C. sec. 2201 declaring that added state defendants and their predecessors created, maintained, perpetuated and have failed to discharge their affirmative obligation to dismantle the racially dual system of public education in the City of Yonkers and its vestiges and effects, in violation of the Constitution of the United States and federal law;

(b) Enter an order pursuant to 28 U.S.C. sec. 2201 declaring that added state defendants UDC and Tese and his predecessors created and perpetuated residential segregation in the City of Yonkers which remains unremedied by the affirmative acts of the State of New York, the UDC or any other state agency or instrumentality;

(c) Enter an order enjoining these added state defendants; their successors in office, agents, employees, assigns and all others acting in concert with them, to cease their unlawful acts and to assist in the implementation of plans to remedy the unconstitutional and illegal segregation in the City of Yonkers and the continued effects of unconstitutional and illegal school segregation;

(d) Enter an order pursuant to 42 U.S.C. sec. 1988 permitting plaintiff-intervenors to recover the costs and reasonable attorneys' fees arising from this action and

(e) Grant such other and further relief as this court deems just and proper.

Respectfully submitted

/s/ MICHAEL H. SUSSMAN
Michael H. Sussman
Sussman & Sussman
30 South Broadway
Suite 418
Yonkers, New York 10701
(914) 968-4558

/s/ GROVER C. HANKINS by BHV
Grover C. Hankins
General Counsel
NAACP
4805 Mt. Hope Drive
Baltimore, Md. 21215
(301) 358-8900

Counsel for Plaintiff-Intervenors

Complaint/Cross-Claim of
The City of Yonkers, and Amendment

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

YONKERS BRANCH - NAACP, et al.,

Plaintiffs-Intervenors,

v. 80 CIV 6761 (LBS)

YONKERS BOARD OF EDUCATION, et al.,

Defendants.

THIRD-PARTY COMPLAINT/CROSS CLAIM

Pursuant to Federal Rules of Civil Procedure 13, 14, and 15, the City of Yonkers files this Third-Party Complaint and amends its answer to assert the claims as stated herein.

Jurisdiction

1. This third-party complaint/cross-claim arises under 42 U.S.C. §§ 1981, 1983, 1985, 1988, 2000d, and 20 U.S.C. § 1701 et. seq., and the Fourteenth Amendment to the United States Constitution. This Court has jurisdiction over this third-party complaint/cross claim pursuant to 28 U.S.C. §§ 1331, 1343(a)(3) and (4), 1367, 2201, and 2202. Pursuant to the All Writs Acts, 28 U.S.C. § 1651, this Court has jurisdiction to issue orders to effectuate and prevent the frustration of its orders previously entered in this action.

Parties

2. Defendant/Third-Party Plaintiff/Cross-Plaintiff City of Yonkers ("City") is a municipal corporation existing under the laws of the State of New York. Pursuant to State law, the City is required to fund the operation, maintenance, and facilities of the Yonkers Public Schools ("YPS").

3. Third-Party Defendant/Cross-Defendant State of New York ("State") is entrusted and vested with the constitutional responsibility for education in New York State. The Legislature of the State is required under Article XI. Section 1 of the New York State Constitution to provide for the maintenance and support of the system of schools wherein all children of the State may be educated. The State receives and distributes federal financial assistance for education and for desegregation-related activities. It also allocates funds for the purpose of assisting local school districts like Yonkers. The educational programs of the State of New York must comport with the requirements of the federal and state constitutions.

4. Third-Party Defendant/Cross-Defendant Governor George Pataki (the "Governor") is sued in his official capacity as Governor and Chief Executive Officer of the State of New York. Pursuant to the Constitution of New York State, the Governor has the responsibility to include in his annual budget funds sufficient to provide for a public system of education in the State of New York that comports with the requirements of the federal and state constitutions. The Governor is a participant in, and has had full knowledge of, the actions of the State as alleged in this Complaint.

5. Third-Party Defendant/Cross-Defendant Richard P. Mills is President of the University of the State of New York ("University") and Commissioner of Education of the State of New York and is sued in his official capacity. As President of

the University, defendant Mills has overall responsibility for administration of the University, which in turn has the responsibility to "distribute to or to expend or administer" for the public schools of the State "such property and funds as the state may appropriate." Education Law, § 201. As Commissioner of Education, defendant Mills has overall responsibility for administration of the State Education Department ("SED"), which administers the allocation of state financial aid to localities for education and administers the allocation of various federal financial aid programs that provide funding for education. Approximately 95% of all federal aid for New York State's school districts is administered by SED, which is responsible for distributing the federal funds to local districts.

6. Defendant H. Carl McCall is Comptroller of the State of New York and is sued in his official capacity. Pursuant to Section 8 of the Finance Law of New York, the Comptroller shall "[s]uperintend the fiscal concerns of the state" and shall "[d]raw warrants to the treasury for the payment of the moneys directed by the law to be paid out of the treasury . . ." Finance Law, § 8.

7. The State defendants described above are necessary and indepensible parties in whose absence complete relief cannot be accorded among those already parties. The claims against these defendants arise out of the transaction and occurrence that is the basis of this ongoing litigation. Their presence in this action is necessary to implement, or at least to avoid the frustration of this Court's orders.

Factual Allegations

8. The City and the Yonkers Board of Education ("YBOE") currently operate under court orders mandating the desegregation of the Yonkers Public School System. *See United States v. Yonkers Board of Education*, 635 F. Supp. 1538

(S.D.N.Y. 1986). In its 1986 School Remedy Order, this Court retained jurisdiction to enforce the terms of its remedial orders "and for all purposes consistent with attaining the objectives of this Order." *Id.* at 1553. In ordering the implementation of the Educational Improvement Plan ("EIP"), this Court directed the Yonkers Board of Education ("YBOE") to advise the Court if for any reason it was unable to implement the Plan because of lack of adequate funding. *Id.* at 1551.

9. Since 1986, the City has been required to operate a desegregated school system that includes an extensive magnet school program, the construction of new schools, the development of additional remedial programs, extensive transportation and many other requirements. Since the entry of the 1986 orders, the annual budget of the Yonkers Public Schools has been the subject of proceedings overseen by the Court's Monitor. During that period, the budget of the Yonkers Public Schools has grown significantly, while municipal spending has been strictly controlled. The New York State Emergency Financial Control Board for the City of Yonkers has also insisted, on an annual basis, that the City meet the requirements of the Court's orders for increased budgets for the Yonkers Public Schools.

10. This Court has found a need to continue efforts to eliminate vestiges of segregation. *See United States v. Yonkers*, 833 F. Supp. 214 (S.D.N.Y. 1993).

11. Education in New York, including desegregation and the provision of equal educational opportunity, is a State function for which the State and its agencies are responsible. The Education Article of the New York Constitution requires the State and its agencies to provide a sound basic education to the children of New York – an education that comports with the equal protection clauses of the federal and state constitutions.

12. The State has an affirmative duty to avoid actions that contravene or undermine desegregation efforts in Yonkers in violation of the Equal Protection Clause of the United States Constitution as currently enforced by court orders. Any arrangement, implemented by State officials at any level, which significantly tends to perpetuate a dual school system, in whatever manner, is constitutionally impermissible. The constitutional rights of the school children of Yonkers not to be discriminated against can neither be nullified openly or directly by State legislators or State executive or judicial officers, nor nullified indirectly by them through evasive schemes for segregation whether attempted "ingeniously or ingenuously." *Gilmore v. City of Montgomery*, 417 U.S. 556 (1974); *Griffin v. County School Board of Prince Edward County*, 377 U.S. 218 (1964).

13. On January 4, 1996, Yonkers Mayor John D. Spencer addressed a committee of State Legislators in an effort to secure funding from the State adequate to finance the education budget and school desegregation requirements for the City's fiscal year of July 1, 1996 through June 30, 1997 ("FY 97"). Spencer advised the Legislators that the inequitable application of the State education aid formulas, coupled with an arbitrary "transition cap" restricting funds allocated to Yonkers and some other districts, impeded and made impossible the City's ability to meet its desegregation responsibilities. Similar notice was provided to the Governor and his staff in the course of numerous communications over the first half of 1996.

14. In April 1996, the Superintendent of the YPS published his Executive Budget to operate the YPS during Fiscal 97. The Executive Budget sought a total appropriation of $245 million. The Superintendent further advised that such a sum is necessary to operate the YPS in a manner consistent with this Court's orders and provide a sound basic education as required by State law.

15. On June 10, 1996, Mayor John D. Spencer wrote to the Governor again advising of an impending budgetary crisis in Yonkers. Spencer detailed the extraordinary actions the City had taken to close its expected FY 97 budget gap of $75 million and to adequately fund the education budget and desegregation remedies. Spencer also explained the unique requirements placed on Yonkers by the federal school desegregation orders of this Court. Spencer counseled the Governor that the amounts expected to be appropriated by the Legislature under the Governor's proposed State budget for State FY 1997 would render the City unable to fund desegregation and asked the Governor to fulfill the State's obligation to provide a sound basic education in compliance with federal and state constitutions to the schoolchildren of the City of Yonkers. The City put the State on notice that application of the State's education funding formula and transition cap to the City of Yonkers, with no consideration being given to the City's obligations to implement this Court's school desegregation orders, will result in the City and YBOE being unable to comply with the Court's orders and the City's constitutional duties to the school children of Yonkers. The City advised the State that the City needed an additional $50 million in recurring state aid to close its budget gap and continue to fulfill its desegregation responsibilities.

16. Notwithstanding the City's efforts to secure adequate education funding, on July 13, 1996, the State Legislature adopted a budget that the Governor subsequently signed into law which appropriated amounts wholly insufficient to fund the City's desegregation efforts. Yonkers did not receive the long sought $50 million in additional recurring state aid; rather, Yonkers received some $29.3 million in aid through a variety of programs. It is the City's current understanding that $22.4 million of that aid is one-time aid that will not recur in future budgets.

17. On July 18, 1996, the Yonkers City Council adopted an FY 97 budget ordinance for the City. The ordinance was approved by the Mayor. The adopted FY 97 City budget ordinance required an increase in municipal property taxes of 9.45% from FY 96 levels and included an appropriation to Yonkers Board of Education ("YBOE") of $228.8 million.

18. The State is currently applying a funding formula to the City which results in Yonkers being rendered financially incapable of fully carrying out the Court's school desegregation orders. This funding formula contains significant disparities in education funding and opportunities available to schoolchildren in Yonkers as compared to that which is available to schoolchildren in other similarly situated school districts in the State. These inequalities threaten to effect a gross and glaring inadequacy of educational opportunities provided by the State to the schoolchildren of Yonkers and threaten to deny those schoolchildren a sound basic education as required by the Education Article of the New York Constitution and the Equal Protection Clauses of the state and federal constitutions. The State's application of its funding formula to the City and its recent inadequate appropriation will result in irreparable injury to the City and its residents, compromising past gains eradicating segregation and its effects in the YPS. As a result, the City and YBOE will be financially incapable of fully complying with this Court's orders.

19. The State has knowingly failed to provide funds adequate to the task of operating the Yonkers Public Schools in a manner consistent with the Court's orders and has rendered it impossible for local authorities in Yonkers to comply with the mandates of the Court concerning school desegregation.

20. The State has failed to adequately assist Yonkers in meeting its obligations and is impeding compliance by Yonkers with the Court's orders concerning school desegregation. The

State's education funding formula as applied to Yonkers and its obligations under the Court's school desegregation orders has rendered the City incapable of meeting the costs of desegregation mandated by the Court.

21. Despite receiving notice, the State has insisted on applying its funding formula with a transition cap to the City, thereby violating the State's duty to avoid actions that would deliberately impede desegregation in the Yonkers public schools.

22. Notwithstanding this Court's previous determination *vel non* of State liability prior to 1985, the State is presently responsible and liable for its *current* actions that impede court-ordered desegregation orders in violation of the Constitution and relevant federal statutes. As the State itself noted in briefing the pre-1985 issues, an entity can be held liable for perpetuating an ongoing constitutional wrong:

> Of course, regardless of whether a school district has been found liable for de jure segregation, it may nonetheless be engaged in current discriminatory conduct which deprives minority students of their constitutional rights. Such conduct is not a "vestige" of a past condition; it is an ongoing constitutional wrong which may be judicially addressed.

United States v. Yonkers, 833 F. Supp. at 219 (quoting State's post-trial brief).

23. The underfunding of Yonkers by the State has rendered Yonkers financially incapable of fully implementing EIP I and of preserving those gains in desegregation thus far achieved and noted by the Court. The State threatens to push forward with its fiscal austerity program and to apply its funding formulas blindly to the City, ignoring the inevitable result of crippling the City's efforts to comply with the Court's orders concerning the desegregation of the YPS.

Causes of Action

24. As described above, the third-party defendants/cross-defendants named herein and their instrumentalities are impeding this Court's desegregation efforts and the City's efforts to comply with the Court's orders. The third-party defendants/cross-defendants have full knowledge that their actions will result in a perpetuation of public school segregation in Yonkers in violation of the Equal Protection Clause of the United States Constitution, 42 U.S.C. § 1983, and the desegregation orders of this Court.

25. As described above, the third-party defendants/cross-defendants named herein and their instrumentalities are denying equal educational opportunity to the schoolchildren of Yonkers, New York, by knowingly impeding desegregation efforts and thereby perpetuating the segregation of students on the basis of race and by failing to take steps to assist in school desegregation efforts and to avoid taking actions that interfere with the desegregation efforts of the City as ordered by this Court. These actions violate the Equal Educational Opportunity Act, 20 U.S.C. § 1701 et seq., and threaten to impede the City's efforts to comply with its obligations under this act.

26. As described above, the third-party defendants/cross-defendants named herein and their instrumentalities, which administer programs and activities receiving federal financial assistance, are discriminating against schoolchildren in the City of Yonkers and are denying them full participation in and the benefits provided by such programs and activities funded in part by federal financial assistance. These actions violate Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000(d) et seq., and threaten to impede the City's efforts to comply with its obligations under Title VI.

27. As described above, the State of New York's funding formula as applied to the City of Yonkers, which operates under

federal court orders to desegregate the Yonkers Public School System, violates the equal protection clauses of the federal and state constitutions as well as the education article of the state constitution (Art. I, Sec. 1).

Prayer For Relief

WHEREFORE, the defendant/third-party plaintiff/cross-plaintiff City of Yonkers respectfully requests that this Court enter judgment as follows:

(1) declaring that the actions of the third-party defendants/cross-defendants as described herein undermine and contravene federal court orders mandating the establishment of a unitary school system in Yonkers, in violation of the Equal Protection Clause of the United States Constitution and 42 U.S.C. § 1983;

(2) declaring that the actions of the third-party defendants/cross-defendants as described herein violate the Equal Educational Opportunity Act. 20 U.S.C. § 1701 et seq.;

(3) declaring that the actions of the third-party defendants/cross-defendants as described herein violate Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000(d) et seq.;

(4) declaring that the application of the State of New York's educational funding formula to the City of Yonkers as described herein violates the equal protection clauses of the federal and state constitutions and the educational article of the New York State Constitution;

(5) preliminary and permanently enjoining – pursuant to both Federal Rule 65 and the All Writs Act – the third-party

defendants/cross-defendants from impeding the City's compliance with this Court's education and desegregation orders and ordering the third-party defendants/cross-defendants to adequately fund the Yonkers education budget in a manner sufficient to enable the City to comply with the mandates of this Court; and

(6) ordering the third-party defendants/cross-defendants to pay the City's reasonable attorneys' fees and costs and for such other relief as may be appropriate.

Dated: August 13, 1996

Respectfully submitted,

s/ Raymond P. Fitzpatrick, Jr.
Raymond P. Fitzpatrick, Jr.
(RF 1705)
Attorney for City of Yonkers

OF COUNSEL:
FITZPATRICK, COOPER & CLARK
1929 Third Avenue North
Farley Building, Suite 600
Birmingham, Alabama 35203
(205) 320-2255

CERTIFICATE OF SERVICE

I hereby certify that I have served the above and foregoing Third-Party Complaint/Cross-Claim by first class mail, this 4th day of February 1997, upon the following counsel:

Steven J. Routh, Esq.
Hogan & Hartson
555 Thirteenth Street, NW
Washington, D.C. 20004

Lawrence W. Thomas, Esq.
Yonkers Board of Education
145 Palmer Road
Yonkers, New York 10701

Marion R. Buchbinder, Esq.
Attorney General of the State of New York
Litigation Bureau
120 Broadway, 24th Floor
New York, New York 10271

Michael H. Sussman, Esq.
25 Main Street
Goshen, New York 10924

Lisa Evans, Esq.
U.S. Department of Justice
Civil Rights Division
10th and Pennsylvania Avenue, NW
Room 7736
Washington, D.C. 20530

Dr. Joseph M. Pastore, Jr.
414 Central Drive
Briarcliff, New York 10510

s/ Raymond P. Fitzpatrick, Jr.
Raymond P. Fitzpatrick, Jr.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

YONKERS BRANCH – NAACP, et al.,

Plaintiff-Intervenors,

-v- 80 CIV 6761 (LBS)

YONKERS BOARD OF EDUCATION, et al.,

Defendants.

FIRST AMENDMENT TO THIRD-PARTY COMPLAINT/CROSS CLAIM OF CITY OF YONKERS

Pursuant to Federal Rules of Civil Procedure 13, 14, and 15, and pursuant to leave of Court granted by Order entered January 23, 1997, the defendant City of Yonkers ("the City") amends its August 1996 Third Party Complaint/Cross Claim as follows:

I. Factual Allegations

The City Amends its August 1996 Third Party Complaint/Cross Claim to add the following factual allegations:

23a. The State has failed to pay the City of Yonkers and YBOE nearly $5 million due under the State education funding formula as applied for FY 1995 and 1996. The State has acknowledged that it owes this amount in three letters from the State Department of Education to the Superintendent of Schools, dated September 7, 1995 and June 11, 1996 (copies

attached as Exhibit A). The State, however, notwithstanding its knowledge of the budgetary needs of the City of Yonkers and the YBOE under the School Desegregation Order, has failed to provide the payments due Yonkers. Under the State's current process of placing such aid payments in line for payment based on availability of State funding, Yonkers will not receive all of those monies until the year 2002.

23b. As recognized by the education monitor in this case, the State's refusal to provide the $5 million due the Yonkers Public Schools is currently impeding the City's and YBOE's ability to comply with the mandates of the Education Implementation Plan I ("EIP I").

23c. The State's refusal to pay the $5 million in aid it acknowledges is due is a knowing failure to provide funds adequate to the task of operating the Yonkers Public Schools in a manner consistent with the Court's orders and has rendered it impossible for local authorities in Yonkers to fully comply with the mandates of the Court concerning school desegregation. The State has knowingly failed to provide education funds that the State acknowledges are already due for previous years under the State's education funding formula.

23d. In proceedings held in 1994, the YBOE and the NAACP plaintiffs developed an extensive record of the State's participation in and responsibility for school segregation in Yonkers. *See United States v. City of Yonkers*, 880 F. Supp. 212 (S.D.N.Y. 1995). The United States Court of Appeals for the Second Circuit has now indicated that this record evidence and the Court's detailed findings concerning State action and inaction support a finding of State liability for school segregation in Yonkers. *See United States v. City of Yonkers*, Nos. 95-6182, 95-6206, Slip Op. at 44 (2d Cir. Sept. 23, 1996).

II. Prayer for Relief

Additionally, the City amends its August 1996 Third Party Complaint/Cross Claim to request the following additional relief:

(5a) preliminary and permanently enjoining – pursuant to both Federal Rule 65 and the All Writs Act – the third-party defendants/cross-defendants from impeding the City's compliance with this Court's education and desegregation orders and ordering the third-party defendants/cross-defendants to immediately make payment of the $5 million the State through its authorized agents acknowledges is due in the correspondence attached as Exhibit A and adequately fund the Yonkers education budget in a manner sufficient to enable the City to comply with the mandates of this Court; and

In all other respects, the original Third Party Complaint/Cross Claim is confirmed and ratified.

Dated: February 4, 1997

Respectfully submitted,

s/ Raymond P. Fitzpatrick, Jr.
Raymond P. Fitzpatrick, Jr. (1705)
Attorney for City of Yonkers
FITZPATRICK, COOPER & CLARK
Farley Building, Suite 600
1929 Third Avenue North
Birmingham, Alabama 35203
(205) 320-2255

CERTIFICATE OF SERVICE

I hereby certify that I have served the above and foregoing Amendment to Third Party Complaint/Cross-Claim by first class mail, this 4th day of February 1997, upon the following counsel:

Steven J. Routh, Esq.
Hogan & Hartson
555 Thirteenth Street, NW
Washington, D.C. 20004

Lawrence W. Thomas, Esq.
Yonkers Board of Education
145 Palmer Road
Yonkers, New York 10701

Marion R. Buchbinder, Esq.
Attorney General of the State of New York
Litigation Bureau
120 Broadway, 24th Floor
New York, New York 10271

Michael H. Sussman, Esq.
25 Main Street
Goshen, New York 10924

Lisa Evans, Esq.
U.S. Department of Justice
Civil Rights Division
10th and Pennsylvania Avenue, NW
Room 7736
Washington, D.C. 20530

Dr. Joseph M. Pastore, Jr.
414 Central Drive
Briarcliff, New York 10510

s/ Raymond P. Fitzpatrick, Jr.
Raymond P. Fitzpatrick, Jr.

THE STATE EDUCATION DEPARTMENT/THE UNIVERSITY OF THE STATE OF NEW YORK/ALBANY, N.Y. 12234
GENERAL AIDS & SERVICES, ROOM B-WEST WING, ALBANY, NEW YORK 12234

662300010000 June 11 1996
AO2621

Superintendent
Yonkers City School District
145 Palmer Road
Yonkers, NY 10701

Dear Mr. Marra,

Revisions to your State Aid claims have resulted in a supplemental payment of 3,567,091.00. You will receive a check for this amount at such time as funds are available. The table on the reverse side specifies the aid years affected, the amount of the adjustment and the types of aid for each year.

To insure that you have received this notification we ask that you initial and return the enclosed form to the above address. If you wish to fax your reply, the number is (518) 473-9808.

If you have questions regarding this supplemental, please contact Joyce McDonald at (518) 474-2977.

Sincerely,

s/ Gregory J. Illenberg
Gregory Illenberg, Coordinator
Education Aid Services

Received by:_____

THE STATE EDUCATION DEPARTMENT/THE UNIVERSITY OF THE STATE OF NEW YORK/ALBANY, N.Y. 12234
GENERAL AIDS & SERVICES, ROOM B-WEST WING, ALBANY, NEW YORK 12234

662300010000 June 11 1996
AO3122

Superintendent
Yonkers City School District
145 Palmer Road
Yonkers, NY 10701

Dear Mr. Marra,

Revisions to your State Aid claims have resulted in a supplemental payment of 289,955.00. You will receive a check for this amount at such time as funds are available. The table on the reverse side specifies the aid years affected, the amount of the adjustment and the types of aid for each year.

To insure that you have received this notification we ask that you initial and return the enclosed form to the above address. If you wish to fax your reply, the number is (518) 473-9808.

If you have questions regarding this supplemental, please contact Joyce McDonald at (518) 474-2977.

Sincerely,

s/ Gregory J. Illenberg
Gregory Illenberg, Coordinator
Education Aid Services

Received by:_____

THE STATE EDUCATION DEPARTMENT/THE UNIVERSITY OF THE STATE OF NEW YORK/ALBANY, N.Y. 12234
GENERAL AIDS & SERVICES, ROOM B-WEST WING, ALBANY, NEW YORK 12234

662300010000 June 11 1996
AO0489

Superintendent
Yonkers City School District
145 Palmer Road
Yonkers, NY 10701

Dear Mr. Marra,

Revisions to your State Aid claims have resulted in a supplemental payment of 1,105,737.00. You will receive a check for this amount at such time as funds are available. The table on the reverse side specifies the aid years affected, the amount of the adjustment and the types of aid for each year.

To insure that you have received this notification we ask that you initial and return the enclosed form to the above address. If you wish to fax your reply, the number is (518) 473-9808.

If you have questions regarding this supplemental, please contact Lynn Butler at (518) 474-2977.

Sincerely,

s/ Gregory J. Illenberg
Gregory Illenberg, Coordinator
Education Aid Services

Received by:_____

Trial Exhibit 3-1 (excerpt):
Journal of a Meeting of the Board of Regents of the University of the State of New York, January 27-29, 1960
(Regents Statement on Intercultural Relations in Education)

REGENTS STATEMENT ON INTERCULTURAL RELATIONS IN EDUCATION

After the Supreme Court decision of May 1954, we have all been a part in reevaluating the role of education in a democracy. It was of greatest significance that the Court in its historic decision stated:

> "We must consider public education in the light of its full development and its present place in American life throughout the nation. . . .
>
> "Today, education is perhaps the most important function of state and local governments . . . it is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. . . .
>
> ". . . to separate (them) from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. . . ."

The State of New York has long held the principle that equal educational opportunity for all children, without regard

to differences in economic, national, religious or racial background, is a manifestation of the vitality of our American democratic society and is essential to its continuation. This fundamental educational principle has long since been written into Education Law and policy. Subsequent events have repeatedly given it moral reaffirmation. Nevertheless, all citizens have the responsibility to reexamine the schools within their local systems in order to determine whether they conform to this standard so clearly seen to be the right of every child.

Modern psychological knowledge indicates that schools enrolling students largely of homogeneous, ethnic origin, may damage the personality of minority group children. Such schools decrease their motivation and thus impair the ability to learn. Public education in such a setting is socially unrealistic, blocks the attainment of the goals of democratic education and is wasteful of manpower and talent, whether this situation occurs by law or by fact.

In seeking to provide effective education for all the children of this State, boards of education are faced with many obstacles in the form of complex social and community problems. Among them is the existence of residential segregation which leads to schools with students predominantly of one race on the elementary and high school levels.

In spite of these and other difficulties, the Regents are determined to accept this challenge facing our schools today. We charge the Regents Advisory Council on Intercultural Relation in Education, working in close cooperation with the State Education Department, to assist in seeking solutions to the educational aspects of the problem. The council's recommendations for action, based on systematic and objective study, will be reported to the Regents in due course.

We recognize that we who have been given the responsibility for the education of the children and youth in our State can deal directly with only these educational aspects. There are larger community problems which influence the quality of education in, and the ethnic composition of our schools. So

long as these larger social problems remain unsolved, it will be difficult to solve some of the basic and related educational situations. For this reason, therefore, we call upon all our citizens and their agencies of government and their civic organizations to take concrete steps to provide the social climate which will make it possible for us to increase the effectiveness of education. Only with this cooperation will we be able to provide that type of democratic education which will enable all children to contribute their understanding, knowledge and skills to increase the greatness of our State and our Nation.

* * *

Trial Exhibit 3-5 (excerpt): Journal of Regents Meeting, February 18-20, 1975 (Regents Statement on Racial Integration of Schools)

Regent Jovanovich moved the adoption of the following statement, which was seconded by Regent Griffith and approved by the members of the Board:*

Our statement of January 22, 1975 clearly indicates that it is made "in support and in addition to" our statement of policy on October 25, 1974.

We understand that *de jure* segregation is not at issue: it is unconstitutional.

We also understand that busing has become a source of serious argument not alone because some of its opponents may be illiberal, or racist, but also because many responsible people, black and white, do not regard the massive transportation of pupils out of their neighborhoods for purposes of achieving racial balance to be productive in the education of our children.

To determine compliance with Regents policy on integration principally by use of quantitative measures is to use a method which itself offers no assurance that the educational opportunity of each child is protected.

Recourse to quantitative measures is not the sole or necessarily the principal method for determining and maintaining school integration or for detecting and correcting school segregation. There are other ways to measure whether or not a school district makes serious efforts to bring about integration of schools.

The Regents commit themselves to the following principles:

• The Regents affirm our conviction that equal opportunity for high quality education is the right of every pupil in the public schools of this State, regardless of race, creed, or color.

---

* Regents Clark and Klein voted in the negative and Regent Genrich abstained.

• The Regents expect every school district to take those steps necessary to enable every pupil to enjoy that primary right, and to provide appropriate appeal procedures for aggrieved pupils and parents.

• The Regents believe that integrated schools are essential to assure that primary right to all pupils residing in racially diverse communities. We define an integrated school as one in which the racial composition of the student body reflects the pupil population of the school district without necessarily attempting to be proportional to it, and in which the programs, facilities, and equipment are not racially identifiable. What constitutes a reflection of the population of a school district will depend upon the circumstances in specific situations.

• The Regents believe that appropriate means to achieve high quality education for all pupils include, where feasible, strategic location of new schools or closing of unneeded schools or both, optional transfer programs and open enrollment, expansion of magnet and specialized schools, compensatory education programs, curriculums which enhance interracial understanding, recruitment of qualified faculty from varied racial and ethnic backgrounds, equalization of State aid to school districts, alteration of school attendance zones where necessary, and in some instances, the judicious and reasonable transportation of pupils with due consideration that the health, safety, and access to high quality education of pupils are not imperiled and with particular consideration that children of elementary school age are not transported for more than moderate distances.

• The Regents believe that racial integration in public schools does not necessitate uniform proportions of pupils, by race or ethnic background in all schools in a district. No single factor—whether it be quality of programs, or competence of staff, or adequacy of facilities or racial or ethnic balance—is alone sufficient to assure that the right of every pupil to high quality education in an integrated school will be

realized. The reference to "serious effort" in our statement of January 22, 1975 speaks to a combination of these factors without sole reliance on any one method of integration or on any one measure of judging integration.

* * *

Trial Exhibit 14-58: A Report on the Education Department's School Desegregation Efforts Over the Past Three Years (January 19, 1981)

Introduction

The Education Department operates an ongoing program in school desegregation which places major emphasis on providing equality of educational opportunity for all students in the public schools of New York State.

Desegregation activities in this area are administered by the Division of Intercultural Relations, a technical assistance unit whose primary functions are:

- Developing, implementing and monitoring desegregation plans.
- Assisting districts to reduce minority-group isolation through Commissioner's Orders, Court Orders, Federal Government Orders, and voluntary means.
- Assisting school districts to meet desegregation-related needs.
- Assisting districts to eliminate sex bias and sex-role stereotyping.
- Assisting districts to comply with Title IX of the Education Admendments of 1972.
- Assisting districts to identify outside funding sources for desegregation-related purposes.
- Assisting school districts to resolve racial/ethnic conflict.
- Assisting districts to develop multicultural curricula.
- Training teachers and administrators in acquiring effective skills for providing educational equity.

- Assisting districts to resolve problems that are occasioned by resegregation.
- Investigating complaints of discrimination in education.

The Department makes every effort to comply with the Regents' Policy Statement of February 20, 1975, which defined an integrated school "as one in which the racial composition of the student body reflects the pupil population of the school district without necessarily attempting to be proportionate to it. . . ." To that end, desegregation-related activities conducted by the Education Department have allowed each school district maximum flexibility so that it can provide the best education possible, while at the same time taking special note of those criteria for integration described in the Regents' February 1975 Statement.

Desegregation-related activities have also been consistent with other Regents' Position Papers in that the Department makes every effort to work cooperatively with school-district officials and with citizens of desegregating communities to make maximum use of voluntary initiatives and to build local plans. This report provides information about the nature and results of desegregation-related activities during the period 1977-80 by showing the degree to which minority-group isolation has been reduced in those school districts where the Department has been involved in desegregation-related activities and also the extent of other activities associated with desegregation during this period.

Changes in the Number of Minority-Isolated Buildings

For the purposes of this report, a school building in which the minority-group percentage deviates 20% or more from the district's minority-group racial/ethnic percentage is considered a minority-isolated building. While no statement identifies the 20% deviation as the standard for New York State,

the Department uses the figure as an indicator because of the following factors:

- U.S. District Court Judge John T. Curtin allowed an average 22.5% deviation in Buffalo.
- The Commissioner's Order in Newburgh allowed a deviation of more than 18% for two schools with special problems.
- The Syracuse desegregation order mandated a minority-group enrollment percentage of between 15% and 45% for each school.

We have concluded that the 20% or better deviation for minority-student enrollment provides a reasonable assessment of the extent of minority-group isolation reduction in the schools and districts.

School districts discussed in this report are those in which there has been some type of Department activity associated with a desegregation-related problem or need. The services performed in these districts are consistent with both State and Federal priorities and guidelines. Table 1 shows the statistical factors that relate to minority-group isolation in the various districts on a building-by-building basis from 1977-78 through 1979-80. It shows that declining enrollment and student reassignment have often been used to reduce minority-group isolation in the 27 districts identified. In these 27 districts, 20 buildings have been closed. The figures show that in 1977-78 there were 552 buildings in these districts of which 172 were considered minority-isolated buildings. However, in 1979-80, there were 532 buildings in these districts, of which 139 were minority-isolated. In addition to the 20 buildings that were closed, minority-group isolation was eliminated in 37 of those buildings that remained opened.

Thus, 31% of the buildings in those 27 districts were considered minority-group isolated buildings in 1977-78, and this figure was reduced to 22.6% in 1979-80. This represents an 8.4% reduction in minority-group isolation for the buildings

in the 27 school districts in which the Education Department has performed desegregation-related activity between the 1977-78 and 1979-80 school years.

Table 2 shows the student enrollment factors in the districts where there was desegregation-related activity. Seventy-six percent of the minority-group students within this State attend schools in the "big five" cities of New York City, Buffalo, Rochester, Syracuse and Yonkers. During the period covered by this report, the enrollment of students in these schools declined by 32,690. Of these, 5,573 (or 17%) were minority-group students, while 27,117 were not members of minority groups. This constitutes an 8% enrollment decline in these districts, of which minority students represent only 1% . Thus, the minority-group isolation among students is also reflected in the fact that the building level concentration of minority-group students remained low in spite of the fact that white student enrollment declined at a rate of 6 to 1 compared to that of minority-group students.

To better understand the comprehensive scope of the Department's desegregation-related activities, one must understand that the needs of these districts have been occasioned by special factors that place them in selected categories, namely:

- Districts currently implementing desegregation plans.
- Previously desegregated districts dealing with resegregation.
- Districts implementing voluntary desegregation plans.
- Districts implementing voluntary urban/suburban interdistrict transfer programs.
- Districts desegregating through magnet schools.
- Districts in which a Commissioner's 310 hearing has been held.
- Districts receiving special assistance or in special circumstances.

- Districts receiving assistance in resolving racial/ethnic conflict.
- Districts targeted for voluntary action in 1981-82.

In order to provide the necessary services that are mandated by this greatly expanded program, the Education Department was required to expand its capacity to meet-desegregation-related needs.

For example, for the 1976-77 school year, the Division of Intercultural Relations received $169,000 in Federal funding and maintained a staff of seven professionals and four-secretaries for its one program in Race Desegregation. For the 1979-80 school year, the Division received $1,000,000 in Federal funding with a staff of fifteen professionals and six secretaries for its five programs, of which two were in Race Desegregation. Additional programs in Intercultural Arts, Women's Educational Equity, Desegregation-Related Attitude Assessment, and Educational Equity for Minority Group Women have been planned for the 1981-82 school year, and Federal funding applications for these programs either have been submitted or are being prepared accordingly.

In order to be more responsive to the special needs occasioned by desegregation-related activities in New York City, a member of the Division of Intercultural Relations staff has been assigned full-time to the New York City area. For the first time in the history of the Education Department, in 1979, examinations were given to the staff of the Division of Intercultural Relations providing staff members with an opportunity to acquire permanent civil service status in the same manner that has prevailed for other employees in the Department. The former Bureau of Educational Integration was upgraded to the Division of Intercultural Relations in 1979, and the Bureau Chiefs position was reclassified to that of Division Administrator. The new Division of Intercultural Relations was assigned to the Office of the Assistant Commissioner for ESC Educational Planning and Support Services with the Commissioner's statement that "the integration and

desegregation activities in the Division of Intercultural Relations require the support of planning, research, and evaluation capabilities in elementary and secondary education. To insure this support is available on a continuing basis, the reorganized Division of Intercultural Relations will report directly to the Assistant Commissioner for Elementary, Secondary, and Continuing Education Planning and Support Services."

Other Desegregation-Related Activities

Table 3 shows the type of desegregation efforts which the Department has used in each of the 27 districts. This is important because of the nature in which Department activities in desegregation are funded. For example:

1. Title IV funding in Race Desegregation is used to provide technical assistance to school districts upon their request. The guidelines restrict the Title IV effort to twelve areas of authorized activities. Funding from this source is also made available for the Race Desegregation Assistance Center at Columbia University for providing the same types of services that are provided by the Division of Intercultural Relations. This report addresses itself only to those activities that have been conducted by the Education Department.

2. Emergency School Aid Act funding is also made available to assist districts in the areas of planning, assessing needs, technical assistance and staff training. The major focus of this program is voluntary desegregation. While this funding is not made available to the Desegregation Assistance Center, it is available for local school districts to perform the same services that, in other cases, are performed by the Education Department. This report shows only those activities that have been conducted by the Education Department.

3. State Purposes funding for the Division is not restricted to any types of activities. However, this funding, which goes directly to the Division of Intercultural Relations, is somewhat less than 12% of the Division's funding for conducting desegregation-related activities. Therefore, these activities, while adhering to Regents and Commissioner's directives, must also show a high degree of consistency with Federal desegregation guidelines and regulations. To the extent that Federal guidelines mandate a request from a school district before assistance can be provided, the Department's desegregation efforts are somewhat restricted.

Anticipations for the Future

The Department's 1981-82 desegregation plans have identified 21 districts in which 128 buildings have been targeted as those in which minority-group isolation should be reduced. A funding proposal for $500,000 has been submitted to the Federal government under the Emergency School Aid Act to begin this program on July 1, 1981.

January 19, 1981.

Table 1

Changes in the Number of Minority Isolated School Buildings*
in School Districts Receiving Departmental Desegregation Assistance 1977-78 and 1979-80

	MINORITY ISOLATED BUILDINGS					ACTIVITIES RELATED TO CHANGE					BASIS FOR ACTION		
	1977-78		1979-80										
DISTRICT	Total Bldgs.	Minority Isolated	Total Bldgs.	Minority Isolated	Net Change	Re-zoning	Magnet School	School Closing	Interdis. Transfer	Other	Fed. Court Order	Comm. Order	Vol Deseg.
Pough-keepsie	8	3	7	0	–3	X	X	X					
Buffalo	87	47	82	30	–17	X	X	X	X		X	X	X
Rochester	68	36	64	29	–7		X		X				X
Glen Cove	7	0	7	0	0						X		
Uniondale	8	2	8	3	+1					X			
Freeport	8	0	8	0	0		X	X				X	X

* A minority isolated school building is one which deviates 20% or greater from the district average. Figures are derived from Basic Education Data (BEDS) reported to the Department by districts.

Table 1 (continued)

	MINORITY ISOLATED BUILDINGS					ACTIVITIES RELATED TO CHANGE					BASIS FOR ACTION		
	1977-78		1979-80										
DISTRICT	Total Bldgs.	Minority Isolated	Total Bldgs.	Minority Isolated	Net Change	Re-zoning	Magnet School	School Closing	Interdis. Transfer	Other	Fed. Court Order	Comm. Order	Vol Deseg.
Baldwin	13	1	13	1	0	X		X					X
Malverne	4	0	4	0	0					X		X	
Rockville Centre	8	1	8	0	−1	X		X				X	
Long Beach	8	0	8	0	0								X
Westbury	6	1	6	0	−1			X					X
CSD #18	18	17	18	16	−1	X			X			X	
CSD #21	29	3	29	3	0				X				
Mark Twain JHS	1	0	1	0	0		X				X		

	MINORITY ISOLATED BUILDINGS					ACTIVITIES RELATED TO CHANGE					BASIS FOR ACTION		
	1977-78		1979-80										
DISTRICT	Total Bldgs.	Minority Isolated	Total Bldgs.	Minority Isolated	Net Change	Re-zoning	Magnet School	School Closing	Interdis. Transfer	Other	Fed. Court Order	Comm. Order	Vol Deseg.
CSD #25	29	2	29	1	–1				X		X		
Andrew Jackson SHS	1	1	1	1	0				X	X		X	
CSD #29**	28	20	28	22	–2						X**		
Staten Island	48	9	48	9	0				X				X
Niagara Falls	21	1	20	1	0	X		X		X			X
Syracuse	38	6	38	4	–2	X	X	X				X	
Newburgh	19	5	17	1	–4	X	X	X				X	
Huntington	9	0	8	0	0	X						X	

** Not counted in the Federal Court tabulation.

Table 1 (continued)

	MINORITY ISOLATED BUILDINGS					ACTIVITIES RELATED TO CHANGE					BASIS FOR ACTION		
	1977-78		1979-80										
DISTRICT	Total Bldgs.	Minority Isolated	Total Bldgs.	Minority Isolated	Net Change	Re-zoning	Magnet School	School Closing	Interdis. Transfer	Other	Fed. Court Order	Comm. Order	Vol Deseg.
Mt. Vernon	14	9	14	10	+1	X	X	X				X	
New Rochelle	13	3	13	2	−1	X		X			X		
White Plains	15	1	12	1	0	X		X					
Yonkers	38	4	35	5	+1			X			X		
Ossining	6	0	6	0	0	X		X					X
TOTAL	552	172	532	139	−37						6	10	11

Table 2

Student Enrollment Factors in Districts Receiving Departmental Desegregation Assistance 1977-78 and 1979-80

	STUDENT ENROLLMENT FACTORS				ENROLLMENT DECLINE		
	1977-78		1979-80				
DISTRICT	Total	Minority %	Total	Minority %	Minority	Other	Total
Poughkeepsie	4356	47.7	3980	53.3	+44	–420	–376
Buffalo	53699	45.7	49565	46.5	–1514	–2620	–4234
Rochester	39639	46.0	35301	47.6	–1410	–2928	–4338
Glen Cove	4055	10.4	3551	10.5	–49	–455	–504
Uniondale	6234	33.0	5938	45.5	+647	–943	–296
Freeport	7794	45.6	7354	48.0	–20	–420	–440
Baldwin	7282	4.7	6575	7.4	+144	–851	–707
Malverne	2553	48.4	2348	49.7	–70	–135	–205
Rockville Centre	4010	5.4	3755	6.1	+13	–268	–255
Long Beach	5646	21.6	5233	21.5	–92	–321	–413

Table 2 (continued)

DISTRICT	STUDENT ENROLLMENT FACTORS				ENROLLMENT DECLINE		
	1977-78		1979-80				
	Total	Minority %	Total	Minority %	Minority	Other	Total
Westbury	3558	71.3	3238	73.7	–150	–170	–320
CSD #18	18666	55.6	17215	61.3	+169	–1620	–1451
CSD #21	23591	19.6	22078	20.9	–10	–1503	–1513
Mark Twain JHS	1093	19.9	881	17.5	–63	–149	–212
CSD #25	23097	15.5	21318	14.8	–430	–1349	–1779
Andrew Jackson SHS	2532	96.9	2501	98.7	+15	–46	–31
CSD #29	24674	70.0	22698	70.4	–1304	–672	–1976
Staten Island	56930	10.5	54399	11.3	+174	–2705	–2531
Niagara Falls	13364	21.2	11556	23.1	–170	–1638	–1808
Syracuse	24641	31.9	22547	32.4	–557	–1537	–2094

Table 2 (continued)

	STUDENT ENROLLMENT FACTORS				ENROLLMENT DECLINE		
	1977-78		1979-80				
DISTRICT	Total	Minority %	Total	Minority %	Minority	Other	Total
Newburgh	12154	27.3	11290	27.4	-223	-641	-864
Huntington	6598	9.5	5799	9.6	-68	-731	-799
Mount Vernon	10504	69.9	9858	71.8	-257	-389	-646
New Rochelle	9841	27.8	8994	29.0	-119	-728	-847
White Plains	7162	30.3	6464	32.0	-101	-597	-698
Yonkers	25518	18.5	22790	20.1	-135	-2593	-2728
Ossining	4874	21.0	4149	23.7	-37	-688	-725
TOTAL	404065		371375		-5573	-27117	-32690

Table 3

Scope of Department Integration/Desegregation Activities*

School District	Conflict Resolution	Desegregation Planning	Funding Assistance	Multicultural Curricula	LEA Staff Development	Resolving Reseg-Regation Problems	Assessing Needs	General Technical Assistance	School/Community Relations	Affirmative Action Assistance
Poughkeepsie		X	X			X	X	X		
Buffalo		X	X	X	X	X	X	X	X	X
Rochester		X	X		X	X	X			
Glen Cove	X									X
Uniondale									X	
Freeport			X		X	X	X		X	
Baldwin		X	X		X		X	X	X	X
Malverne	X					X				
Rockville Centre	X	X	X	X	X		X	X	X	

* These are in addition to the regular desegregation activities shown in Table 1.

Table 3 (continued)

School District	Conflict Resolution	Desegregation Planning	Funding Assistance	Multicultural Curricula	LEA Staff Development	Resolving Reseg-Regation Problems	Assessing Needs	General Technical Assistance	School/Community Relations	Affirmative Action Assistance
Long Beach	X		X		X				X	
Westbury					X	X				
CSD#18		X	X			X				
CSD #21			X					X		
Mark Twain Jr. H.S.			X			X	X	X		
CSD #25			X				X			
Andrew Jackson Sr. H.S.		X	X	X	X		X	X		
CSD #29			X	X				X		
Staten Island	X		X	X	X		X	X	X	X
Niagara Falls		X	X		X	X	X	X		
Syracuse		X	X	X	X		X	X		
Newburgh	X	X	X	X	X		X	X	X	X

Table 3 (continued)

	Conflict Resolution	Desegregation Planning	Funding Assistance	Multicultural Curricula	LEA Staff Development	Resolving Reseg-Regation Problems	Assessing Needs	General Technical Assistance	School/Community Relations	Affirmative Action Assistance
Huntington		X				X				
Mt. Vernon		X	X	X		X	X	X	X	X
New Rochelle		X	X		X	X	X	X	X	
White Plains		X	X			X		X		
Yonkers		X	X		X		X	X	X	
Ossining	X			X		X			X	

Constitutional and Statutory Provisions Involved

United States Constitution

The United States Constitution, Fourteenth Amendment, Section 1, provides in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress * * *.

20 U.S.C. § 1703 provides in pertinent part:

> No State shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by—
>
> (a) the deliberate segregation by an educational agency of students on the basis of race, color, or national origin among or within schools;
>
> (b) the failure of an educational agency which has formerly practiced such deliberate segregation to take affir-

mative steps, consistent with part 4 of this subchapter, to remove the vestiges of a dual school system;

(c) the assignment by an educational agency of a student to a school, other than the one closest to his or her place of residence within the school district in which he or she resides, if the assignment results in a greater degree of segregation of students on the basis of race, color, sex, or national origin among the schools of such agency than would result if such student were assigned to the school closest to his or her place of residence within the school district of such agency providing the appropriate grade level and type of education for such student;

(d) discrimination by an educational agency on the basis of race, color, or national origin in the employment, employment conditions, or assignment to schools of its faculty or staff, except to fulfill the purposes of subsection (f) below;

20 U.S.C. § 1706 provides in pertinent part:

An individual denied an equal educational opportunity, as defined by this subchapter may institute a civil action in an appropriate district court of the United States against such parties, and for such relief, as may be appropriate.

20 U.S.C. § 1720 provides in pertinent part:

For the purposes of this subchapter—

(a) The term "educational agency" means a local educational agency or a "State educational agency" as defined by section 801(k) of the Elementary and Secondary Education Act of 1965.

(b) The term "local education agency" means a local educational agency as defined by section 801(f) of the Elementary and Secondary Education Act of 1965.

(c) The term "segregation" means the operation of a school system in which students are wholly or substantially separated among the schools of an educational agency on the basis of race, color, sex, or national origin or within a school on the basis of race, color, or national origin.

(d) The term "desegregation" means desegregation as defined by section 2000c(b) of Title 42.

(e) An educational agency shall be deemed to transport a student if any part of the cost of such student's transportation is paid by such agency.

FILED
APR 13 2000
CLERK

(3)

No. 99-1370

In the

Supreme Court of the United States

OCTOBER TERM, 1999

THE STATE OF NEW YORK; THE BOARD OF REGENTS OF THE STATE OF NEW YORK; CARL T. HAYDEN; EDWARD J. MEYER, R. CARLOS CARBALLADA; ADELAIDE L. SANFORD; DIANE O'NEILL McGIVERN; SAUL B. COHEN; ROBERT M. BENNETT, ROBERT M. JOHNSON; ANTHONY S. BOTTAR; MERRYL H. TISCH, HAROLD O. LEVY;

(Caption Continued on Inside Front Cover)

ON PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

YONKERS BRANCH NAACP'S OPPOSITION TO STATE OF NEW YORK'S PETITION FOR WRIT OF CERTIORARI

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ENA L. FARLEY; GERALDINE CHAPEY; RICARDO OQUENDO; ELEANOR BARTLETT; and ARNOLD GARDNER, in their official capacities as members of the State Board of Regents; DEPARTMENT OF EDUCATION OF THE STATE OF NEW YORK; RICHARD P. MILLS, as Commissioner of Education of the State of New York, URBAN DEVELOPMENT CORPORATION OF THE STATE OF NEW YORK; CHARLES A. GARGANO, as Chairman of the Urban Development Corporation; GEORGE E. PATAKI, as Governor of the State of New York, and H. CARL McCALL, as Comptroller of the State of New York,

Petitioners,

-vs-

YONKERS BOARD OF EDUCATION; YONKERS BRANCH-NATIONAL ASSOCIATION FOR THE ADVANCE OF COLORED PEOPLE; REGINA RYER, a minor by her mother and next friend, CHARLOTTE RYER, on behalf of themselves, and all individuals similarly situated and THE CITY OF YONKERS,

Respondents.

QUESTIONS PRESENTED

1. Whether the Court of Appeals properly interpreted the Equal Protection Clause and 42 U.S.C. § 1983 to hold petitioners liable for school segregation in the City of Yonkers where the district court held, and the Court of Appeals affirmed, that their failure to take remedial action, together with actions which contributed to school segregation, were in response to pressures by State and local officials and their constituents who opposed desegregation on grounds that were known to be race-based?

2. Whether petitioners may properly seek Supreme Court review when this Court denied certiorari three years ago on the same issue and no intervening events warrant a contrary result?

3. Whether, as to the propriety of an Educational Improvement Plan, the petition is premature since there has never been a finding that the school district is unitary and the Court of Appeals has directed the district court to revisit the issue of vestiges?

4. Whether the petition is untimely to the extent it seeks review of the constitutionality of the Equal Educational Opportunity Act, particularly since this Court declined to review petitioners' same argument three years ago and no intervening events warrant a contrary result?

RULE 29.6 STATEMENT

In accordance with Sup.Ct.R. 29.6, respondent NAACP states that it does not have a corporate parent, subsidiary or affiliate.

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COUNTER STATEMENT OF THE CASE

In 1980, the United States sued the City of Yonkers, the Yonkers Board of Education, and the Yonkers Community Development agency, alleging housing and school segregation in violation of the Equal Protection Clause and federal civil rights statutes. The NAACP intervened as a plaintiff the following year, and the case was subsequently certified as a class action.

After trial, the district court found that the defendants had committed intentional racial discrimination in housing and in education. *See*, *United States v. Yonkers Board of Education*, 624 F.Supp. 1276 (S.D.N.Y. 1985) (Sand, J.), *aff'd*, 837 F.2d 1181 (2d Cir. 1987). Specifically, the Board had clung to a neighborhood school policy with full knowledge that the City's location of subsidized public housing only in minority neighborhoods would lead to segregated schools; had manipulated school openings and closings and attendance zones to create and preserve racially identifiable schools; had rejected several reasonable proposals that would have desegregated the student population; had consigned students in predominantly minority schools to inferior facilities and staff; had followed a policy of disproportionately assigning minority teachers and staff to schools with predominantly minority student populations and had assigned minority students disproportionately to special education classes. *See*, 837 F.2d at 1212-14.

The district court further found that the City was liable for school segregation because it had pursued a discriminatory housing policy with the intent to keep racially identifiable schools and because the mayor's appointments to the Board of Education evinced a desire to continue segregated schools in Yonkers. *Id.* at 1214-15.

A year later, the district court issued its remedial order for the Yonkers schools. *See, United States v. Yonkers Board of Education*, 635 F.Supp. 1538 (S.D.N.Y. 1986) (Sand, J.), *aff'd* 837 F.2d 1181 (2d Cir. 1987). Its *stated* goal was to achieve the desegregation of the student population in every school in the system by the 1987-88 school year. The principal tools for achieving that goal were the creation of City-funded magnet programs to attract non-minorities to predominantly minority schools and the adoption of a "controlled choice" system for student assignments. *See*, 837 F.2d at 1215. This remedial order has come to be known as the first Educational Improvement Plan ("EIP I").

In 1994, the district court held a lengthy trial on whether the State should be held liable for Yonkers's unlawful school segregation and its vestiges. The district court held, *inter alia*, that (1) State education officials knew that *de jure* segregation existed and was increasing in Yonkers schools but took no steps to prevent or remedy that segregation and (2) State education officials failed to implement established New York State policy which required eradication of even *de facto* segregation, and (3) State officials' conduct was motivated by racially-based community and political opposition to desegregation. However, the district court declined to hold the State had violated the Equal Protection Clause for its failure to remedy racial discrimination in Yonkers. *See*, *United States v. City of Yonkers*, 880 F.Supp. 212 (S.D.N.Y. 1995).

In 1996, the Second Circuit affirmed the district court's findings of fact that the State of New York had been aware of *de jure* segregation by the City of Yonkers in its public schools, and that the State had failed to take corrective measures. *United States v. Yonkers Board of Education*, 96 F.3d 600, 611 (2d Cir. 1996). However, the Court held that the State could be liable under the Fourteenth Amendment and the Equal Educational Opportunity Act. *Id.* at 619, 621.

On June 23, 1997, this Court denied the State's petition for certiorari to review the Second Circuit's opinion. *New York v. Yonkers Board of Education*, 521 U.S. 1104 (1997).

In 1997, the district court held a second trial to determine whether vestiges of discrimination remained in Yonkers schools and, if so, to determine a proper remedy. On October 8, 1997, the district court held that, as it had in 1993, vestiges of segregation persisted. (39a). *See, United States v. Yonkers Board of Education*, 984 F.Supp. 687 (S.D.N.Y. 1997). Accordingly, the district court ordered the State and City defendants to fund EIP II, a well-tailored program designed to address existing vestiges.

On appeal, the Second Circuit vacated Judge Sand's findings on vestiges. *See, United States v. City of Yonkers*, 181 F.3d 301 (2d Cir. 1999). However, in November 1999, on NAACP's motion for reargument, the Second Circuit remanded the matter to the district court for further fact-finding as to whether vestiges exist and, if so, the appropriate remedy. (1a). Judge Sand has yet to issue any ruling on remand. The Court of Appeals has ordered that jurisdiction be restored to it without a new notice of appeal when any of the parties furnishes it with a copy of the district court's ruling on remand. (32a).

REASONS FOR DENYING CERTIORARI

This Court will only grant a petition for certiorari for compelling reasons, including a conflict with a decision of another circuit or to review an opinion that "has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure from a lower court, as to call for an exercise of the Court's supervisory power." Sup.Ct.R. 10.

Petitioners seek review on two issues properly decided by the United States Court of Appeals in 1996. This Court denied certiorari on those very issues in 1997. Since petitioners have identified no intervening authority warranting a contrary result, certiorari should be denied.

Moreover, to the extent it challenges the propriety of EIP II issued by the district court, the petition is premature since there has never been a finding that the school district is unitary and the Court of Appeals has directed the district court to revisit the issue of vestiges.

POINT I

THE SECOND CIRCUIT'S STATE LIABILITY OPINION IS ENTIRELY CONSISTENT WITH SUPREME COURT AUTHORITY

This Court should reject the State of New York's argument that the Second Circuit improperly imposed § 1983 liability against it for failing to remedy *de jure* school segregation of which the State had constructive notice. The State misreads the panel's decision which plainly holds that the State knew about *de jure* segregation in Yonkers. The State also ignores settled Supreme Court authority that § 1983 liability may attach if State decisionmakers ignored constitutional violations that were known or "plainly obvious."

A. *The State's petition is improvident*

The State's petition is untimely on the issue of whether the Second Circuit properly imposed § 1983 liability against the State. The State seeks review of a Second Circuit decision issued on September 23, 1996. (66a). On June 23, 1997, this Court denied the State's certiorari petition which challenged the central tenet of that opinion: the Equal Protection Clause prohibits the State from capitulating to racially-motivated

pressure in declining to correct local school segregation. *New York v. Yonkers Board of Education*, 521 U.S. 1104 (1997).

The State now asserts that, in its 1996 opinion, the Second Circuit improperly imposed § 1983 liability on the ground that the State was unaware that school segregation in Yonkers was *de jure*. The State's primary authority for this proposition is *Board of County Commissioners of Bryan County, Okl. v. Brown*, 520 U.S. 397 (1997), issued nearly two months before this Court denied certiorari on the Second Circuit's state liability opinion.

The State could have moved for re-hearing on the denial of its Petition when this Court issued *Bryan County*. Sup.Ct.R. 44.2. It did not. Instead, the State chose to wait until the Second Circuit again issued an adverse opinion on unrelated issues over three years later. As the State could have timely preserved its interests in 1997 when this Court last addressed issues surrounding municipal liability under § 1983, certiorari is unwarranted.

B. *The Second Circuit's State liability decision is wholly consistent with settled Supreme Court authority governing municipal liability under § 1983*

Section 1983 "contains no state-of-mind requirement independent of that necessary to state a violation" of a federally-protected right. *Daniels v. Williams*, 474 U.S. 327, 330 (1986). "In any § 1983 suit, however, the plaintiff must establish the state-of-mind required to prove the underlying violation." *Bryan County*, 520 U.S. at 405.

Although § 1983 does not permit *respondeat superior* liability, municipalities are liable under the Constitution if their "deliberate conduct . . . was the 'moving force' behind the injury alleged. That is, a plaintiff must show that the municipal action was taken with the requisite degree of culpability and must demonstrate a direct causal link between

the municipal action and the deprivation of federal rights." *Id.* at 404.

Accordingly, as both fault and causation predicate § 1983 liability, *id.* at 405, the question is not (as the State suggests) simply whether the State had "actual knowledge" of constitutional violations. Petition at 18. Rather, liability may attach if the policymaker deliberately disregarded constitutional consequences that were known or "plainly obvious." *Id.* at 411. This test is reflected in the various ways § 1983 plaintiffs may establish municipal liability. *See*, *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 690-91 (1978); *Owen v. Independence*, 445 U.S. 622 (1980); *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981) (§ 1983 authorizes suit "for constitutional deprivations visited pursuant to governmental 'custom' even though such a custom has not received formal approval through the body's official decisionmaking channels"); *City of Canton v. Harris*, 489 U.S. 378 (1989) (municipal liability may attach on an "inadequate training" theory if "the municipal action was taken with 'deliberate indifference' as to its known or obvious consequences").

Notably, in the school segregation context, this Court has held that "actions having foreseeable and anticipated disparate impact are relevant evidence to prove the ultimate fact, forbidden purpose. . . . Adherence to a particular policy or practice, 'with full knowledge of the predictable effects of such adherence upon racial imbalance in a school system is one factor among many others which may be considered by a court in determining whether an inference of segregative intent should be drawn.'" *Columbus Board of Education v. Penick*, 443 U.S. 449, 464-65 (1979).

The Second Circuit's State liability opinion fell squarely within settled Supreme Court authority and confirmed that

the State both knew about and condoned the segregation and is therefore liable under § 1983.

In holding that the Equal Protection Clause prohibits State officials from capitulating to racially-motivated pressures in failing to eradicate school segregation, the Second Circuit sustained the following factual conclusions reached by the district court:

> [T]hough the district court stated that it did not find that the State officials and UDC themselves performed affirmative acts of intentional discrimination, it found that the State knew of the segregation in Yonkers, had actual or constructive knowledge that the segregation was *de jure*, had the power to take steps to remedy that segregation, and refused to exercise that power because they were capitulating to political pressures that they knew were racially motivated. In detail, the district court found, *inter alia*, that
>
> - the State was aware of circumstances that should have alerted it to Yonkers's unlawful segregation of its schools, and "if in fact the State defendants were not so alerted, it was because they themselves chose to remain ignorant" "in the face of actual conflicting evidence,"
>
> - *the State had "actual or constructive[ ] knowledge of illegal racial segregation in the Yonkers public schools,"*
>
> - *the State had "full knowledge of the nature, cause and extent of the segregation in the Yonkers public schools,"*

- the State "knew that Yonkers," "if left to its own devices, was not going to remedy the segregation voluntarily[.]"

. . .

Thus, the district court found that the State had exhibited a "determined reluctance to enforce its own desegregation policy in Yonkers"; that the State decided that "it would not force Yonkers to change"; and that determined reluctance was a knowing response to increasing "opposition . . . to racial integration." In sum,

> the State determined not to take any affirmative action to deal with Yonkers school segregation because of political and other pressures, from within the Board of Regents and from without, which opposed vigorous desegregation efforts. These pressures can only be explained in racial terms. (96a-99a) (emphases supplied).

Moreover, State officials took action that helped perpetuate *de jure* segregation. *See*, 77a ("[i]n addition to refusing to act to end segregation in Yonkers, the State took certain actions that had the effect of encouraging that segregation"); 106a ("[t]he court permissibly found that the State acted in a way that had the effect of encouraging the perpetuation of *de jure* segregation and knew that through its actions and omissions it was capitulating to pressures that were racially motivated"); 109a (State education officials "were aware that citizen opposition to desegregation in Yonkers was motivated by racial animus. . . . State defendants . . . took actions that encouraged the perpetuation of segregation").

The Second Circuit concluded: "In sum, the record evidence amply supports the district court's finding that the

State defendants had full knowledge of the nature, cause, and extent of the segregation in the Yonkers schools, and that they knew or should have known that the school segregation in Yonkers was *de jure*." (102a).

Accordingly, contrary to the State's petition, the panel imposed § 1983 liability on the ground that the State "knew or should have known" that school segregation in Yonkers was *de jure*. (102a). A plain reading of the panel decision confirms that State officials knew full well that Yonkers' schools were illegally segregated. To the extent the State looked the other way in the face of obvious illegal segregation, settled Supreme Court authority confirms that the Second Circuit properly imposed § 1983 liability against it. Certiorari is unwarranted.

POINT II

THE STATE'S PETITION WITH REGARD TO EIP I FUNDING IS IMPROVIDENT AND PREMATURE

In November 1985, the district court held that the Yonkers Board of Education and the City of Yonkers had engaged in *de jure* segregation in violation of intervenors' constitutional rights. In May 1986, the district court adopted a school desegregation remedy, Education Improvement Plan ("EIP") I, which remains in effect to this date. In 1996, the Court of Appeals held the State defendants responsible for contributing to racial segregation in Yonkers' public schools and the district court ultimately ordered the State to contribute to the annual cost of EIP I.

To this date, the State has never moved in the district court for a declaration that the City of Yonkers School Board has attained unitary status and no evidentiary hearing on this issue has ever been held.

In 1997, the district court determined, for the second time in four years, that the Yonkers school system continued practices which it deemed vestiges of segregation and discrimination. After further remedial proceedings, the district court ordered the State and City defendants to fund EIP II, a well-tailored program designed to address existing vestiges. On appeal, the Court of Appeals for the Second Circuit vacated Judge Sand's findings on vestiges (*see*, 181 F.3d 301 (2d Cir. 1999)) and ultimately — in November 1999 — remanded the matter to the district court for further fact-finding as to whether there are vestiges and, if so, the appropriate remedy. (1a). *See*, 5a ("Now, upon further reflection, we are convinced by Judge Sack's view, expressed in his partial dissent to our initial opinion on this appeal, that it is prudent to ask the district court to make further findings on the present record and in light of this opinion as to whether — or not — there are remaining vestiges of segregation in the Yonkers school system, and if so what they are and what record evidence is relied on for support").

As the issue of vestiges is currently on remand to the district court from the Court of Appeals, there has been no final decision below on whether or not there are continuing educational vestiges of segregation and discrimination and, if there are, how these should be remedied. In the meantime, the State defendants are required to continue to pay their share of the cost of implementing EIP I. Absent a finding of unitary status — and as stated above, no party has made such a motion — the Yonkers Board of Education appropriately has continued to implement that plan. *See*, *Board of Educ. of Oklahoma City Public Schools v. Dowling*, 498 U.S 237, 245 (1991). This Court has long since held that before a defendant school district or State may be absolved from the costs of implementing a desegregation plan, a hearing to establish whether unitary status exists must be held and those opposing such a declaration — typically those who prevailed

in the first instance — must be given a full and fair opportunity to oppose the same. This has never happened here and the State defendants' failure to move below makes immaterial the *dicta* in the recent Court of Appeals decision to the effect that Yonkers has achieved full integration as required by the factors identified in *Green v. County School Board*, 391 U.S. 430 (1968). (15a). In fact, this proposition has never been tested below and there has been no finding that the school district has proceeded in good faith and shall continue to proceed in good faith to implement all the provisions of EIP I.

The State submits to this Court that the relevant current inquiry is whether "a cause of action" against State defendants currently exists. This is fatuous. The inquiry is whether the conditions which the State helped to create are still in need of remedy and, more precisely, whether State or local defendants have carried *their* burden in the district court and established compliance with EIP I and the kind of good faith that would entitle them to relief from that injunction. As no such motion has even been made below, the State has no business seeking this Court's review on this issue.

POINT III

THIS COURT HAS ALREADY DECLINED TO REVIEW THE STATE'S ARGUMENT THAT THE ELEVENTH AMENDMENT PRECLUDES LIABILITY UNDER THE EQUAL EDUCATIONAL OPPORTUNITY ACT AND THE PETITION IS IMPROVIDENT

Like petitioners' § 1983 argument, the certiorari petition is procedurally defective to the extent it seeks review on the issue of whether the Second Circuit properly imposed liability under the EEOA, 20 U.S.C. § 1701 *et seq*. The State seeks review of a Second Circuit decision issued on September 23, 1996. (66a). On June 23, 1997, this Court denied

the State's certiorari petition which expressly asserted that the Eleventh Amendment prohibited the Second Circuit from holding the State liable under the EEOA. *New York v. Yonkers Board of Education*, 521 U.S. 1104 (1997).

Relying principally on Supreme Court authority *pre-dating* the last certiorari petition, the State *again* asserts that the Eleventh Amendment precludes the Second Circuit from imposing EEOA liability against the State. The State offers nothing new on this issue other than cite this Court's most recent Eleventh Amendment ruling, *Kimel v. Florida Board of Regents*, 120 S.Ct. 631 (2000). However, the State does not analyze *Kimel* nor suggest that case undercuts the Second Circuit's 1996 State liability decision. *See*, Petition at 25.

On its most recent appeal to the Second Circuit, the State sought to preserve its EEOA arguments by asserting, *inter alia*, that the Eleventh Amendment precludes imposition of EEOA liability against the States. *See*, State Defendants-Appellants' Brief (Second Circuit), Feb. 13, 1998, at 88-89. Resolving this issue, the Second Circuit noted, "[t]he State wishes to preserve its argument that it cannot be held liable as a matter of law for the acts and omissions the district court and this Court have found contributed to segregation in Yonkers, so it raises the argument here again. We reject it for the same reasons we adduced in 1996." *United States v. City of Yonkers*, 181 F.3d at 320 n.4.

As the State offers no basis to revisit an issue that this Court and the Second Circuit have already rejected, certiorari is unwarranted.

CONCLUSION

This Court should deny the petition for certiorari.

Dated: April 13, 2000
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No. 99-1370

IN THE

Supreme Court of the United States

THE STATE OF NEW YORK, ET AL.
Petitioners,

v.

YONKERS BOARD OF EDUCATION, ET AL.
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION OF RESPONDENT YONKERS BOARD OF EDUCATION

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QUESTIONS PRESENTED

1. Whether the Second Circuit correctly held that the State of New York and officials of the State were liable under the Equal Protection Clause and the Equal Educational Opportunities Act ("EEOA") for school segregation in the City of Yonkers where the District Court found—and it is undisputed in this Court—that the State and its officers

- "failed to exercise their authority and failed to fulfill their responsibility to take steps to achieve desegregation in Yonkers, and instead took actions that encouraged the perpetuation of segregation, because of their deference to the racially inspired positions of the local officials and the known anti-desegregation stance of other state officials," and
- "knew of the segregation in Yonkers, had actual or constructive knowledge that the segregation was *de jure*, had the power to take steps to remedy that segregation, and refused to exercise that power because they were capitulating to political pressures that they knew were racially motivated."

2. Whether the Second Circuit correctly held that the State remained liable for contributing to the funding of a remedy for unaddressed vestiges of segregation on the facts of this case.

3. Whether the Second Circuit correctly held, as every other federal court to consider the issue has done, that the EEOA abrogates a State's Eleventh Amendment immunity from suit in federal court.

4. Whether the Second Circuit correctly held the State institutional defendants liable under the EEOA on the facts of this case.

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IN THE

Supreme Court of the United States

No. 99-1370

THE STATE OF NEW YORK, ET AL.,

Petitioners,

v.

YONKERS BOARD OF EDUCATION, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF IN OPPOSITION OF RESPONDENT YONKERS BOARD OF EDUCATION

Respondent the Yonkers Board of Education respectfully requests that this Court deny the petition for a writ of certiorari seeking review of decisions of the United States Court of Appeals for the Second Circuit in this case.

INTRODUCTION

The petition for writ of certiorari is the latest effort of the State of New York and various state-related entities and officials (collectively, "the State") to avoid their responsibility for assisting in the completion of the desegregation remedy in the Yonkers public schools. The State's petition seeks review of two decisions of the Second Circuit address-

ing the State's participation in two distinct desegregation plans adopted for the Yonkers schools. In the court of appeals' most recent decision, it relieved the State and local defendants of responsibility for the second of those plans, the so-called Educational Improvement Plan ("EIP") II. The court reversed the district court's finding that certain vestiges of segregation remained, and remanded the case to the district court "for a limited purpose," Pet. App. 6a—"to make further findings on the present record and in light of this opinion as to whether—or not—there are remaining vestiges of segregation in the Yonkers school system." *Id.* at 5a. Thus, to the extent the petition challenges continued proceedings related to EIP II—which was vacated by the Second Circuit and will "doubtless be revisited" on remand, *id.* at 31a, 26a—it is premature; there has yet to be a final determination of whether unaddressed vestiges of segregation remain in Yonkers, let alone whether the State is responsible for remediation efforts as to any such vestiges.

Perhaps in recognition of the prematurity of any challenge to the Second Circuit's handling of issues related to EIP II, the State's petition focuses primarily on issues related to the earlier remediation plan—referred to as EIP I—which were largely addressed in the Second Circuit's 1996 decision. *Id.* at 66a. The State filed a petition seeking review of that decision in 1997 (No. 96-1628), raising the same arguments—in many places using essentially the same language—as it now raises here. The Court denied the State's 1997 petition, and nothing in the current petition calls that decision into question. In fact, the petition cites no new intervening developments or decisions in other circuits demonstrating that the issues it presents are the subject of continuing debate in the lower courts. There is no more reason to grant review of the Second Circuit's 1996 decision now than there was three years ago. The petition therefore should be denied.

COUNTERSTATEMENT

1. This school desegregation case was initiated in 1980 by the United States (later joined by the NAACP) against the City of Yonkers, the Yonkers Community Development Agency, and the Yonkers Board of Education. In 1985, the district court found, *inter alia*, that the City and the Yonkers Board had unlawfully segregated the public schools in Yonkers, in violation of the Fourteenth Amendment. 624 F. Supp. 1276 (S.D.N.Y. 1985), *aff'd*, 837 F.2d 1181 (2d Cir. 1987), *cert. denied*, 486 U.S. 1055 (1988).

In affirming that decision, the Second Circuit recognized that "race-based decisions" had contributed to school segregation and inequalities in Yonkers in a number of areas, including: (i) the special education program; (ii) the vocational education program; (iii) the quality of school facilities and programs generally; and (iv) school staffing. 837 F.2d at 1195-1208, 1226-33. The Second Circuit also affirmed the district court's finding that there was an "interrelationship" in Yonkers between the unlawful segregation of schools and unlawful segregation of subsidized housing as a result of site selection decisions that concentrated subsidized housing in Southwest Yonkers, where schools had disproportionately minority enrollments, and maintained the "all-white" character of other areas and schools in the City. *Id.* at 1185-94, 1208-09, 1214-15.

2. In 1986, the district court approved a school desegregation remedy, *see* 635 F. Supp. 1538, which effectively ended the segregation of students among school facilities in Yonkers. The court specifically has found that, "[a]s a result of the good faith and zealous implementation by the Yonkers Board of Education and its staff of this Court's initial School Remedy Order of May 13, 1986 (Educational Improvement Plan ("EIP") I)," the Yonkers Board "achieved desegregation of enrollments among the schools" in "less than a year of the issuance of EIP I." 833 F. Supp. 214, 216 (1993).

The plaintiffs, however, soon concluded that EIP I, while effective in ending overt segregation among schools, was not and would not be effective in eliminating to the extent practicable inequalities in the educational program, in-school segregation, and other vestiges of the unlawful dual school system, or in supporting effective desegregation of schools in Yonkers pending implementation of the housing remedy. The plaintiffs filed motions to add the State defendants as parties to the case, and the Yonkers Board sought leave to file a cross-claim.[1] The proposed pleadings alleged that the State had contributed to unlawful segregation in Yonkers and therefore could be held liable and required to participate in the additional remedial measures needed to complete the process of making the Yonkers public schools a unitary system.

After substantial delays caused in large measure by the State's actions, the district court granted the motions to add the State defendants and conducted a three-week trial addressed to the issue whether "vestiges of segregation remain in the Yonkers Public School system" which were not being "adequately addressed" by EIP I. Pet. App. 208a. The district court defined "[a] vestige of segregation" as "a policy or practice which is traceable to the prior *de jure* system of segregation and which continues to have discriminatory effects," *id.* at. 213a, consistent with this Court's holdings in *United States* v. *Fordice*, 505 U.S. 717 (1992), and *Freeman* v. *Pitts*, 503 U.S. 467 (1992). Using this definition, the district court found that "vestiges of segregation remain in the Yonkers Public School system" and that the EIP I desegregation remedy was "inadequate to eradicate vestiges of

[1] The State defendants included the State itself, the State Education Department ("SED"), the State Urban Development Corporation ("UDC"), and the Board of Regents, which are collectively referred to as "the State institutional defendants." Also included were the individual Regents of the Board of Regents, the Commissioner of Education, and the Director of the UDC (collectively "the State officials").

segregation 'root and branch' and must be expanded." Pet. App. 228a.

3. In 1994, the district court conducted a six-week trial on whether the State was liable for unlawful school segregation and its vestiges in Yonkers as of the time of the district court's 1985 decision. Plaintiffs presented testimony from over thirty witnesses as well as over 2,000 exhibits. The district court received testimony from members and former members of the Board of Regents, a former State Commissioner of Education and a former Deputy Commissioner, key officials from the SED, the former head of the UDC, and UDC officials who were responsible for its subsidized housing in Yonkers. The court also received testimony from Yonkers officials and community leaders who interacted with the State on school and housing issues.

The district court made extensive factual findings, which were either unchallenged or affirmed on appeal. These included findings that:

- "[T]he State knew about the segregation that existed in the Yonkers Public Schools, knew that Yonkers would not on its own take the steps necessary to end the segregation, and either knew or reasonably should have known that the segregation was *de jure* rather than *de facto*." Pet. App. 134a.
- The State "possessed the full means and authority to deal with Yonkers school segregation, had it been inclined to do so." *Id.* at 183a. *See also id.* at 140a ("the State had several effective means for compelling local compliance with its racial integration policy during the years at issue in this litigation. If the State did not in fact force compliance, it certainly was not because it lacked the authority or practical power to do so").
- Rather than using that authority, "the State defendants did nothing to remedy school segregation in Yonkers,

using none of their power and authority toward that end." *Id.* at 76a. "Rather than act, the State waited." *Id.* at 140a.

- To the extent it did act, moreover, "the State took certain actions that had the effect of *encouraging* that segregation." *Id.* at 77a (emphasis added).
- "The *reasons* for the State defendants' actions and inactions * * * were that those defendants were responding to pressures by New York State officials and constituents who opposed desegregation on grounds that were known to be race-based." *Id.* at 78a (emphasis added). *See also id.* at 143a (State's "determined reluctance" to address racial segregation in Yonkers was because "race-based political opposition to integration throughout New York State eventually exerted enough pressure on [State education] officials as to cause them to become cautious and reactive on the issue of desegregation"). The pressures to which State officials responded, the lower courts found, "can only be explained in racial terms." *Id.* at 80a, 183a.
- The State's "race-based" conduct had the effect of perpetuating unlawful segregation in Yonkers in both "obvious" and "more subtle, but equally real" ways. *Id.* at 147a. "The most obvious way was that 'Yonkers was not forced to desegregate its schools.' " *Id.* at 80a (quoting *id.* at 147a).
- Like the State itself, the UDC—"perhaps the most powerful state housing and development agency ever created," *id.* at 149a—"had the power to take steps to alleviate" the unlawful segregation in Yonkers but "failed to do so, and instead worsened segregation by knowingly bowing to political pressure it knew to be race-based." *Id.* at 82a.

Despite these findings, the district court concluded "with reluctance," *id.* at 183a, that there was insufficient evidence to find the State officials liable under 42 U.S.C. § 1983. It relied solely on its resolution of the "close and difficult question," Pet. App. 165a, of interpretation of the decision in *Arthur* v. *Nyquist*, 573 F.2d 134 (2d Cir.), *cert. denied*, 439 U.S. 860 (1978). *See* Pet. App. 160a-166a; 179a-182a. It also found that the claims against UDC and its officials were time-barred. *Id.* at 177a-179a. In a separate opinion, the district court declined to hold the State institutional defendants liable pursuant to the Equal Educational Opportunities Act ("EEOA"), 20 U.S.C. § 1701 *et seq.*, or Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, *et seq.* *See* Pet. App. 185a-204a.

4. On respondents' appeal, the State challenged "only the finding that the State defendants knew or reasonably should have known that the segregation in Yonkers was *de jure* rather than *de facto*." Pet. App. 99a. After reviewing the evidence, the Second Circuit held that it "amply supports the district court's finding that the State defendants had full knowledge of the nature, cause, and extent of the segregation in the Yonkers schools, and that they knew or should have known that the school segregation in Yonkers was *de jure*." *Id.* at 102a. The Second Circuit also found based on a review of the evidence that the district court's other factual findings—essentially not challenged by the State defendants—were "amply supported." *Id.* at 105a.

On the strength of the district court's factual findings, the Second Circuit unanimously reversed the district court's admittedly "reluctan[t]" conclusion, *id.* at 183a, that the State defendants could not be held liable. After reviewing "fundamental principles governing equal protection claims," *id.* at 91a; *see id.* at 91a-96a, the court found that "[t]hese principles govern the present case," because the district court "found that the State knew of the segregation in Yonkers, had actual or constructive knowledge that the segregation was *de*

jure, had the power to take steps to remedy that segregation, and refused to exercise that power because they were capitulating to political pressures that they knew were racially motivated." *Id.* at 96a-97a. The Second Circuit stated that the record left "no doubt" that "the State defendants failed to exercise their authority and failed to fulfill their responsibility to take steps to achieve desegregation in Yonkers, and instead took actions that encouraged the perpetuation of segregation, because of their deference to the racially inspired positions of the local officials and the known anti-desegregation stance of other state officials." *Id.* at 109a.

The "amply supported factual findings," the Second Circuit held, "distinguish the present case from *Arthur* v. *Nyquist*," the case on which the district court had relied. *Id.* at 105a. In that case, there was evidence that the state officials "made substantial, repeated efforts" to require local officials in Buffalo to develop and implement a desegregation plan and that "the state officials' decision not to use more drastic measures was the result of legitimate considerations rather than of their capitulation to views they knew to be racially motivated." *Id.* at 106a. The court found the evidence "materially different" with respect to Yonkers, *id.*, and held that the State officials were liable under § 1983.

The Second Circuit further held that the EEOA abrogated the Eleventh Amendment immunity of the State institutional defendants, expressly endorsing the conclusion of the Seventh Circuit in *Gomez* v. *Illinois State Board of Education*, 811 F.2d 1030, 1038 (7th Cir. 1987). Pet. App. 111a. *See also Los Angeles Branch NAACP* v. *Los Angeles Unified Sch. Dist.*, 714 F.2d 946 (9th Cir. 1983), *cert. denied*, 467 U.S. 1209 (1984). On the merits of the EEOA claims, the court found the district court's rejection of the claims infected with its misunderstanding of the Second Circuit's *Arthur* decision, and, therefore held that "[p]laintiffs' claims against the State, SED, and the Board of Regents under the EEOA should have been upheld." Pet. App. 115a. For this conclusion, it relied

on the Sixth Circuit's decision in *United States* v. *School District of Ferndale*, 577 F.2d 1339 (6th Cir. 1978).[2]

The State petitioned this Court for review of the Second Circuit's decision, raising questions concerning: (1) whether state education officials could be held liable based on the facts as found by the district court; (2) whether Congress abrogated the states' Eleventh Amendment immunity in the EEOA; (3) the scope of the EEOA; and (4) the statute of limitations. This Court denied certiorari on June 23, 1997. *See* 521 U.S. 1104.

5. On remand, the district court considered the proper remedy, and ultimately adopted "a set of measures * * * designated EIP II." Pet. App. 12a. *See id.* at 54a-62a. Before doing so, however, "the court wisely took the opportunity to revisit the question of whether vestiges of segregation persisted" in the Yonkers schools in 1997. *Id.* at 11a. *See also id.* at 41a. After hearing the evidence, the district court found that the Yonkers Board of Education "has clearly demonstrated by a strong preponderance of the evidence that vestiges of segregation currently exist in the Yonkers Public School system" that EIP I and other existing remedial measures were not "adequate to eradicate." *Id.* at 43a. The court therefore "adopt[ed]" and "reaffirm[ed]" its 1993 vestiges decision. *Id.*

The district court further held that "a causal relationship exists between the conduct of the State" outlined in its earlier findings "and the existence of vestiges of segregation in the

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[2] In the Second Circuit, respondents argued that the State officials and the State itself were liable under Title VI. The court's conclusions with respect to § 1983 and the EEOA made it unnecessary for the court also to consider that basis for liability. *See* Pet. App. 116a. Respondents reserved their right to raise Title VI in support of the judgment below in any future proceedings. The States' Eleventh Amendment immunity is expressly abrogated for Title VI claims. 42 U.S.C. § 2000d-7. *See Franklin* v. *Gwinnett County Pub. Schs.*, 503 U.S. 60, 72 (1992).

[Yonkers Public Schools]." *Id.* It therefore found the State liable for eliminating such vestiges and for participating in funding a remedy to accomplish that goal. *Id.* at 44a.

6. The State appealed to the Second Circuit. In its initial decision, a divided panel reversed outright on questions related to EIP II. It found that there was insufficient evidence to support the district court's conclusion that vestiges of segregation not being addressed by EIP I continue to exist in the Yonkers schools. 181 F.3d 301, 312-317 (2d Cir. 1999). In the absence of sustainable findings that such vestiges continue, the Second Circuit also rejected the district court's adoption of EIP II as a remedy that "exceeded the admittedly broad power of the district court." *Id.* at 318. The court of appeals, however, sustained the district court's apportionment of remedial costs for EIP I, under which the State was required to share equally in the annual costs of the remedy. That apportionment, the court held, was within the broad equitable discretion of the district court. *Id.* at 320.

Judge Sack dissented in part, objecting to the court's "reversal of the district court's finding of vestiges and its order implementing [EIP II]," and believing that the court should "remand on those issues for the district court to make an adequate statement of its factual findings." *Id.* at 321.

On a petition for rehearing, the court adopted Judge Sack's view. Although the court "adhere[d] to" the conclusions of its initial opinion that "there was insufficient record support for the only two vestiges found by the district court and that the remedy imposed by the district court was unsustainable," Pet. App. 5a, it concluded "upon further reflection, * * * that it is prudent to ask the district court to make further factual findings on the present record and in light of this opinion as to whether—or not—there are remaining vestiges of segregation in the Yonkers school system, and if so what they are and what record evidence is relied on for support." *Id.* The court therefore remanded to the district court for that purpose.

REASONS FOR DENYING THE WRIT

The State's petition is largely a rehash of its 1997 petition seeking review of the Second Circuit's 1996 decision. That petition was appropriately denied by this Court, and the State offers no additional reasons—let alone the sort of compelling reasons that are ordinarily required for this Court to exercise its jurisdiction—for the Court to review the well-supported decisions of the courts below. The State primarily seeks this Court's review of factual findings that the Second Circuit found "amply supported" in the record. To the extent it raises legal issues, the petition identifies no conflict in the circuits or any other factor that should compel this Court to grant review.

Indeed, from all that appears in the petition, nothing has occurred in the three years since the Court denied review to provide any additional reason for review. This static environment confirms that this case involves no recurring or hotly debated-issue warranting this Court's attention.

I. THE HOLDING OF THE COURT BELOW—THAT THE STATE'S OWN CONDUCT VIOLATED THE EQUAL PROTECTION CLAUSE BOTH BY CAPITULATING TO RACIAL PRESSURES IN DEROGATION OF ITS RESPONSIBILITY FOR SCHOOLS AND BY ENCOURAGING RACIAL SEGREGATION IN YONKERS—DOES NOT WARRANT REVIEW

The State's attack on the factual findings below, Pet. 17-20, attempts to isolate out of context the finding that "the State knew about the segregation that existed in the Yonkers Public Schools, knew that Yonkers would not on its own take the steps necessary to end the segregation, and either knew or reasonably should have known that the segregation was *de jure* rather than *de facto*." Pet. App. 134a. That finding, the State contends, "conflicts with this Court's recent precedents holding that actual knowledge, not constructive knowledge,

of constitutional violations is a prerequisite to imposing supervisory liability on governmental entities for the constitutional violations caused by their employees or others under their control." Pet. at 17-18.

This argument is far wide of the mark. In focusing on one sentence of the voluminous record and multiple findings below and on the theory of "supervisory liability," the State has failed to account for the findings of the lower courts establishing its *direct* liability for segregation in Yonkers. There is, in any event, no compelling reason for this Court to review the Second Circuit's application of settled law concerning supervisory liability to the facts of this case. Nor does the decision below implicate any conflict in the lower courts compelling this Court's intervention.

1. The Second Circuit specifically recognized in this case that, to establish an equal protection violation, a plaintiff must "show not only that the state action complained of had a disproportionate or discriminatory impact but also that the action was taken with intent to discriminate." Pet. App. 91a (citing *Village of Arlington Heights* v. *Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977); *Keyes* v. *School Dist. No. 1*, 413 U.S. 189 (1973)). The court of appeals also recognized that "the forbidden segregative intent [is] established where governmental defendants took actions in response to and in accordance with community pressures that they knew were racially motivated." Pet. App. 93a-95a (citing *Yonkers III*, 837 F.2d at 1224; *Smith* v. *Town of Clarkton*, 682 F.2d 1055 (4th Cir. 1982)).

In keeping with these settled principles, the State was held liable not simply under the "supervisory liability" theory on which the State's petition is focused but also directly for its own actions. The record is replete with findings—ignored in the petition—that State officials not only failed to act to remedy unlawful segregation in Yonkers but took actions that helped perpetuate segregation. *See, e.g.*, Pet. App. 77a ("In

addition to refusing to act to end segregation in Yonkers, the State took certain actions that had the effect of encouraging that segregation"); *id.* at 77a-78a ("[T]he Board of Regents itself took actions that were, and were recognized to be, designed to cut back on school desegregation"); *id.* at 109a ("[T]he State defendants * * * took actions that encouraged the perpetuation of segregation").

The record, moreover, leaves no doubt about the defendants' motivations and intent for their actions and inaction. The opinions below are replete with findings—not challenged here—that the State's actions and inaction with respect to Yonkers school segregation were a known capitulation to discriminatory views and pressures. *See, e.g., id.* at 97a (State officials "refused to exercise that power [to remedy segregation] because they were capitulating to political pressures that they knew were racially motivated"); *id.* at 106a ("[T]he State acted in a way that had the effect of encouraging the perpetuation of *de jure* segregation and knew that through its actions and omissions it was capitulating to pressures that were racially motivated"); *id.* at 107a (State's failure to act was "the result of a knowing capitulation to racially inspired pressures").

Finding discriminatory intent in such circumstances falls squarely within this Court's previous articulation of equal protection principles. As the Court has observed, "[p]rivate biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect. 'Public officials sworn to uphold the Constitution may not avoid a constitutional duty by bowing to the hypothetical effects of private racial prejudice that they assume to be both widely and deeply held.'" *Palmore* v. *Sidoti*, 466 U.S. 429, 433 (1984) (quoting *Palmer* v. *Thompson*, 403 U.S. 217, 260-261 (1971) (White, J., dissenting)). *Accord City of Cleburne* v. *Cleburne Living Ctr., Inc.*, 473 U.S. 432, 448 (1985).

Thus, there is nothing remarkable about imposing liability on the State where it is found to have given quarter to private biases through its actions and inaction. The decisions below instead represent a commonplace application of settled equal protection principles. Indeed, because the decisions hold the State responsible for its *own* actions, they raise none of the concerns at issue in the cases on which the State relies, where the Court adopted particular standards of liability to avoid the risk that a defendant "would be liable in damages not for its own official decision but instead for its employees' independent actions." *Gebser* v. *Lago Vista Ind. School Dist.*, 524 U.S. 274, 290-291 (1998). *See* Pet. 18, 20. The unchallenged findings below fully support the Second Circuit's decision imposing liability on the State for its own official decisions with respect to Yonkers.

In light of the unchallenged findings that the State itself undertook racially discriminatory actions in response to pressures it knew to be motivated by racial animus, the petition's exclusive focus on issues of supervisory liability simply fails to account for the decisions of the courts below—which focused on the *State's* actions and the *State's* intent in taking those actions. Those decisions are fully supported by the factual findings and settled principles of law, and the State has identified no reason for this Court to consider application of those principles to the facts at issue here. There is, therefore, no need to consider the State's primary argument that the courts below grounded its liability on inadequate factual findings concerning its knowledge of and participation in discriminatory actions of local officials.

2. Even if it could be shown that the only basis on which the State was held liable was that it "should have known" of the constitutional violations in Yonkers yet did nothing to correct them, certiorari would still be unwarranted.

There is no dispute about the state of mind applicable to "claims under § 1983 alleging that a municipality's actions in

failing to prevent a deprivation of federal rights was the cause of the violation." *Gebser*, 524 U.S. at 291. Under *City of Canton* v. *Harris*, 489 U.S. 378, 388-389 (1989), a governmental entity will be held liable where its actions amounted to "deliberate indifference" to the constitutional rights at issue. In *Board of County Commissioners of Bryan County* v. *Brown*, 520 U.S. 397, 407 (1997), for example, the Court held that "a plaintiff seeking to establish liability on the theory that a facially lawful municipal action has led an employee to violate a plaintiff's rights must demonstrate that the municipal action was taken with 'deliberate indifference' as to its known or obvious consequences." Under this standard, municipal decisionmakers' "continued adherence to an approach that they know *or should know* has failed to prevent tortious conduct by employees may establish the conscious disregard for the consequences of their action—the 'deliberate indifference'—necessary to trigger municipal liability." *Id.* (emphasis added).

To the extent they addressed the State's failure adequately to control the actions of the local entities, the decisions below are comfortably within the standards articulated by this Court. Quite clearly, the factual findings made by the district support the view that the State continued to adhere to an approach toward Yonkers—"hands off"—that it knew or should have known had failed to prevent segregative actions in the Yonkers schools. *See, e.g.* Pet. App. 129a-42a (even though the State received specific notice that "'Yonkers public schools really need[ed] investigation'" due to "gerrymandered" attendance boundaries and other racial inequities, recognized that "Yonkers would not on its own take the steps necessary to end the segregation," and had available "several effective means" routinely used to ensure local school district compliance with legal and education standards where race was not involved, it "essentially adopted a wait-and-see attitude" and knowingly tolerated a racially dual system of schools in Yonkers for over two decades). Under *City of*

Canton and *Bryan County*, such conduct by the State readily qualifies as "deliberate indifference" sufficient to impose liability under § 1983.

The State complains that the Second Circuit erred by relying on a finding that the State "either knew or reasonably should have known that the segregation [in Yonkers] was *de jure* rather than *de facto*," Pet. App. 134a, arguing that this finding illegitimately imposed liability on the basis of its "constructive knowledge" of constitutional violations. Pet. 17-20. Even the State, however, does not contend that direct proof of actual knowledge is necessary, for it recognizes that a municipality can be liable where officials "deliberately disregarded constitutional consequences which were actually known *or plainly obvious*." Pet. 18 (citing *Bryan County*, *supra*) (emphasis added). *See also id.*, 520 U.S. at 407 (plaintiff "must demonstrate that the municipal action was taken with 'deliberate indifference' as to its known or obvious consequences"); *Farmer* v. *Brennan*, 511 U.S. 825, 841 (1994) ("*Canton* understanding of deliberate indifference[] permit[s] liability to be premised on obviousness or constructive notice"). Again, this standard is readily met on the factual findings here. *See, e.g.*, Pet. App. 129a-142a.

While the State apparently contends that *Gebser* and *Davis* v. *Monroe County Bd. of Educ.*, 526 U.S. 629 (1999), impose a higher standard of proof, Pet. 18, it never made any such argument below. Indeed, although *Gebser* was decided before the September 1998 oral argument of the case in the Second Circuit, the State never took any steps to bring that case to the attention of the court of appeals or to explain how it thought the decision undermined the basis for liability. *Gebser* and *Monroe County*, moreover, took place in an entirely different context—involving liability for sexual harassment under Title IX of the Education Amendments of 1972, 42 U.S.C. § 1681 *et seq.* This Court has recognized that the applicable "deliberate indifference" standard might well mean different things in different contexts, *see Farmer*,

511 U.S. at 840-842, and the State's attempt to import the standards of *Gebser* and *Monroe* into a different statutory context is therefore unfounded.

Nor is there any suggestion in the petition that the lower courts are wrestling with application of the *Gebser* standard to desegregation cases arising under § 1983 and reaching different results. Indeed, while the Second Circuit has not been asked to apply *Gebser* to the context at issue here, it is clear that the Second Circuit understands *Gebser* and applies it where appropriate under this Court's decisions. *See Gant* v. *Wallingford Bd. of Educ.*, 195 F.3d 134, 141 n.6 (2d Cir. 1999) ("The Supreme Court has rejected the use of * * * an objective ('should have known') test for deliberate indifference in the Title IX context, as well as in the Eighth Amendment context") (citations omitted). There is no compelling reason to grant certiorari on the bald assumption that the Second Circuit will err—let alone that a conflict will develop—if it is asked to consider the implications of *Gebser* and *Monroe County* in a context analogous to the one here.

3. As it did in its 1997 petition, the State posits a conflict between the decision below and *Reid* v. *Kayye*, 885 F.2d 129 (4th Cir. 1989), and "[a] case very similar to" it (*id.* at 132)—*Bush* v. *Viterna*, 795 F.2d 1203 (5th Cir. 1986). *See* Pet. 20-21. The purported conflict is wholly illusory.

The plaintiffs in both *Reid* and *Bush* attempted to hold state officials liable under § 1983 for allegedly unconstitutional conditions at county jails. In each case, the attempt was rejected on the ground that, while the state officials may have had *authority* under state law to make recommendations or take some corrective action with respect to the conditions of which plaintiffs complained, they had no state law-imposed *duty* or *responsibility* to do so. *See Reid*, 885 F.2d at 131. Both courts recognized, however, that a state official can be held to have "caused" for § 1983 purposes a violation of

federal rights on a supervisory liability theory. *See id.* at 131-132;[3] *Bush*, 795 F.2d at 1206, 1208.

Here, the Second Circuit determined that the State officials *did* have both power *and* responsibility to take action in response to the unconstitutional acts and conditions that they knew were occurring in Yonkers. The State argued in the court below that "the judgment in their favor should be upheld on the basis that, under New York law, they lacked legal authority or responsibility to intervene in Yonkers to remedy the unlawful segregation." Pet. App. 107a. The Second Circuit, however, concluded that "this contention need not detain us long" in light of "express provisions of New York statutory law" which specifically direct that state officials "shall enforce" all laws relating to education and are charged with the "duty" to take necessary steps to that end. *Id.* at 107a-108a (emphasis omitted). Pointing to various provisions of the New York Education law (and also to several New York state cases), *see id.*, the Second Circuit stated: "Given the statute's clear impositions of duty and grants of power, the State defendants' twin disclaimers of responsibility and authority are meritless." *Id.* at 109a.[4]

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[3] "It is true that, while the doctrine of *respondeat superior* cannot be invoked in § 1983 cases, supervisory officials may be held liable in certain circumstances for constitutional injuries inflicted by their subordinates. Liability in those circumstances is not premised on *respondeat superior* but on a recognition that supervisory indifference or tacit authorization of subordinates' misconduct may be a causative factor in constitutional injuries." *Reid*, 885 F.2d at 131-132 (citation omitted).

[4] The record below also contains extensive evidence—in the form of admissions both by state officials and in state policy statements and reports—that the State consistently has conceded that it has a duty to prevent and remedy school segregation. *See, e.g.*, Trial Exhibit 3-7 (1968 Policy Statement of State Board of Regents: "Where a district fails or refuses to act [to prevent or remedy school segregation], then the responsibility for corrective action is clearly and inescapably that of the State"). The record further contains extensive evidence as well as district court findings confirming that, with respect to issues other than school

In light of all this—a central focus of the Second Circuit's 1996 decision—there is no basis for the State's assertion that "the Second Circuit undertook no analysis of the respective state and local roles which exist as a matter of state law." Pet. 20. The State's complaint is instead with the Second Circuit's fully supported analysis of that very point. The Second Circuit's understanding of the responsibilities imposed on the State officials under New York law is clearly an issue of state law that does not merit this Court's attention.[5]

Furthermore, even if the State had no duty under New York law to prevent the establishment and maintenance of an unlawful dual school system in Yonkers, but only discretionary authority to do so, its failure to exercise that authority *because of* illegitimate racial reasons is sufficient to impose liability. *See DeShaney* v. *Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 197 n.3 (1989) (although Due Process Clause does not require a State to provide protective services, failure to do so for discriminatory reasons violates Equal Protection Clause) (citing *Yick Wo* v. *Hopkins*, 118 U.S. 356 (1886)); *see also DeShaney*, 489 U.S. at 210 (Brennan, J., dissenting) (under *DeShaney* footnote 3, state "inaction" violates equal protection if it is "the product of invidious discrimination"). In neither *Reid* nor *Bush* was there an allegation that state officials failed to act for racially

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segregation and desegregation, the State not only has acknowledged but also has vigorously discharged its duty to supervise the schools and to take corrective action as necessary to ensure full compliance by Yonkers officials with federal and state law and policy. *See, e.g.*, Pet. App. 139a (finding that New York State Education Department "is one of the most activist state educational bodies in the country").

[5] *See Huddleston* v. *Dwyer*, 322 U.S. 232, 237 (1944) ("ordinarily we accept and therefore do not review, save in exceptional cases, the considered determination of questions of state law by the intermediate federal appellate courts"); *see also County Ct. of Ulster County* v. *Allen*, 442 U.S. 140, 153-154 (1979) (the Second Circuit's "experience with New York practice is entitled to respect").

invidious reasons. Here, by contrast, in factual findings ignored by the State, the courts below found that the State officials "had the power to take steps to remedy [the segregation in Yonkers], and refused to exercise that power because they were capitulating to political pressures that they knew were racially motivated." Pet. App. 97a.

This case is therefore like *Penick* v. *Columbus Board of Education*, 663 F.2d 24 (6th Cir. 1981), *cert. denied*, 455 U.S. 1018 (1982), in which state education officials, including the state board of education, were found liable for segregation in Ohio. Much like the New York state defendants in this case, the Ohio state board was found liable for "adopt[ing] a 'hands-off, let someone else do it' approach" to school desegregation. 663 F.2d at 27. Thus, far from creating an intercircuit conflict, the court below likely *avoided* conflict by following *Penick*.

II. THE HOLDING OF THE COURTS BELOW THAT THE STATE REMAINS LIABLE FOR COSTS OF EIP I ON THE FACTS OF THIS CASE DOES NOT WARRANT REVIEW.

There is no reason to grant review to consider the State's specious contention that the Second Circuit has concluded that it is permissible to require the funding of a remedy without any finding of vestiges. Pet. at 22-24. Under the Second Circuit's decision, the State has been required to contribute only to EIP I—the remedy that was first implemented in 1986. Although that remedy has been successful in eliminating segregation in school *enrollment*, that is but one step in achieving a truly unitary school system, and measures adopted in EIP I also attempted to address the additional steps that would be necessary to achieve unitary status.[6] In its 1997 decision, the district court rejected "[t]he

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[6] The State deems the absence of a "formal[] * * * declaration" of unitary status "immaterial," and would have this Court simply assume that the Yonkers school district is unitary. Pet. 23. But

claim that EIP I's goals have already been fulfilled," Pet. App. 53a, and ordered continued funding by the State of EIP I, *see, e.g.*, Pet. App. 33a. The State did not challenge that finding on appeal.

While the Second Circuit reversed the finding that certain previously unaddressed vestiges justified the *additional* remedies of EIP II, it plainly understood that EIP I presented separate issues and affirmed the district court's decision to provide ongoing remedies for conditions identified by the district court in 1985 and 1986. *See* Pet. App. 30a-31a. To the extent the State's argument depends on the Second Circuit's vacatur of the 1997 district court decision, moreover, the argument is premature, because the case was remanded to the district court for further factual findings. Thus, the State's second question presented is premised on a purported finding that was not made and is therefore hypothetical.

III. THE HOLDING OF THE COURT BELOW THAT THE STATE INSTITUTIONAL DEFENDANTS WERE LIABLE UNDER THE EQUAL EDUCATIONAL OPPORTUNITIES ACT IS NOT IN CONFLICT WITH DECISIONS OF OTHER FEDERAL COURTS AND DOES NOT WARRANT REVIEW.

The Second Circuit held in its 1996 decision that the State institutional defendants were liable under the EEOA. *See*

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this Court has made clear that "[p]roper resolution of any desegregation case turns on a careful assessment of it facts," *Freeman*, 503 U.S. at 474, and is therefore committed to the sound and informed discretion of a district court judge. *See, e.g., id.* at 487; *Board of Educ.* v. *Dowell*, 498 U.S. 237, 249-250 (1991). There is no authority for the State's claim that a court, much less this Court in the first instance, may assume unitary status where no party has requested a declaration of that status and where the careful inquiries directed to that determination have yet to be made.

Pet. App. 110a-115a.[7] The State contends that the Second Circuit erred in holding (1) that in the EEOA Congress abrogated the States' Eleventh Amendment immunity from suit, *see* Pet. 24-27, and (2) that the State institutional defendants were liable under the EEOA. *See id.* at 28-30. Neither contention merits review.[8]

1. The State's Eleventh Amendment argument is nearly word-for-word the same as the argument in its earlier petition.[9] It identifies no new court of appeals decisions on the subject and no new principles of law from this Court's cases which might counsel in favor of reviewing the Second Circuit's 1996 decision on the EEOA. Instead, the State simply repeats its challenge to the way in which settled law concerning Eleventh Amendment immunity has been unanimously applied by the lower courts in the EEOA context. In these circumstances, review is not warranted.

a. As the State concedes, the Seventh and Ninth Circuits agree with the Second Circuit's conclusion that the EEOA abrogates a State's Eleventh Amendment immunity. *See* Pet. 27 (citing *Gomez*, 811 F.2d at 1037 ("Congress abrogated the states' Eleventh Amendment immunity to the extent necessary to effectuate the purposes of the [EEOA]"),

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[7] The Second Circuit recognized that the Eleventh Amendment barred the imposition of liability against the State institutional defendants pursuant to § 1983. *See* Pet. App. 110a (citing *Will* v. *Michigan Dep't of State Police*, 491 U.S. 58 (1989)).

[8] As an initial matter, we note that issues surrounding the EEOA have little independent significance in this case. A determination that the judgment must be reversed to the extent it relies on the EEOA would not affect the judgment against State officials under 42 U.S.C. § 1983.

[9] Indeed, the State apparently did not even bother to update the only record citation in its Eleventh Amendment argument to reflect the fact that the petition appendix pages have changed with the addition of the more recent Second Circuit and district court decisions. *Compare* Pet. at 26 (citing Pet. App. 46a) *with* 1997 Pet. at 22 (citing Pet. App. 46a for the same quotation).

and *Los Angeles Branch NAACP*, 714 F.2d at 950 ("Congress abrogated California's immunity from suit in desegregation cases by enacting [the EEOA]")).[10] With admirable (but misguided) pluck, the State argues that the unanimity of the Second, Seventh, and Ninth Circuits is itself a reason "why certiorari is warranted in this case." Pet. 27. This Court's usual practice, however, is to step into a legal fray only when the circuit courts are at odds. *See Braxton* v. *United States*, 500 U.S. 344, 347 (1991) (a "principal purpose for which we use our certiorari jurisdiction * * * is to resolve conflicts among the United States courts of appeals").

The State implies that *Gomez* and *Los Angeles Branch NAACP* are somehow flawed (although no court has rejected them) because they were "decided before *Dellmuth* [v. *Muth*, 491 U.S. 223 (1989)] and this Court's more recent pronouncements" on the Eleventh Amendment. Pet. 27. The Court's "more recent pronouncements," however, have not altered the settled test for determining when Congress has abrogated the States' immunity, but rather focus on whether the abrogation is constitutionally-authorized—something the State has not challenged.[11] Thus, for example, in 1985—two years before *Gomez* was decided—this Court could say that the requirements for Eleventh Amendment abrogation were already "well established in our cases." *Atascadero State*

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[10] *Accord Stanley* v. *Darlington County Sch. Dist.*, 879 F. Supp. 1341, 1363-67 (D.S.C. 1995), *rev'd on other grounds*, 84 F.3d 707 (4th Cir. 1996); *Board of Pub. Educ. for Savannah* v. *Georgia*, No. CV 490-101, 1990 WL 608208, at *6 (S.D. Ga. Sept. 24, 1990) ("*Savannah Board*").

[11] The State does not dispute that the EEOA was "passed pursuant to a constitutional provision granting Congress the power to abrogate." *Seminole Tribe of Florida* v. *Florida*, 517 U.S. 44, 59 (1996). In any event, "[t]here can be no dispute that the EEOA was passed pursuant to the enforcement authority of § 5 of the Fourteenth Amendment." *Gomez*, 811 F.2d at 1037. Section 5, of course, grants Congress abrogation power. *See Kimel* v. *Florida Bd. of Regents*, 120 S. Ct. 631, 644 (2000); *Seminole Tribe*, 517 U.S. at 59.

Hosp. v. *Scanlon*, 473 U.S. 234, 242 (1985). Although *Dellmuth*—the only recent case other than *Atascadero* on which the State relies heavily—was decided after *Gomez*, both *Stanley* and *Savannah Board* cite *Dellmuth* but hold that the EEOA abrogates Eleventh Amendment immunity. At all events, as shown below, this holding is in no way contrary to *Atascadero* or *Dellmuth*.

b. That the EEOA abrogates state sovereign immunity is not only the unanimous view of the courts of appeals, it is the legally correct view. "Congress' intent to abrogate the States' immunity from suit must be obvious from 'a clear legislative statement.' " *Seminole Tribe*, 517 U.S. at 55 (quoting *Blatchford* v. *Native Village of Noatak*, 501 U.S. 775, 786 (1991)). As every court that has considered the issue has determined, the language of the EEOA—specifically, 20 U.S.C. §§ 1703 and 1706—meets this standard. *See Gomez*, 811 F.2d at 1037 (it is "clear" that the EEOA abrogates state sovereign immunity); *Los Angeles Branch NAACP*, 714 F.2d at 951 (EEOA "clearly" abrogates Eleventh Amendment); *Stanley* v. *Darlington County Sch. Dist.*, 879 F. Supp. at 1365 ("The EEOA clearly manifests Congress' intent to abrogate Eleventh Amendment immunity for suits brought under the EEOA"); *Savannah Board*, 1990 WL 608208, at *6 ("Congress' intention to abrogate the states' immunity is clearly expressed in the text of the [EEOA]").

Section 1703 provides: "No *State* shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by * * * (b) the failure of an educational agency which has formerly practiced such deliberate segregation to take affirmative steps * * * to remove the vestiges of a dual school system" (emphasis added). Creating a judicial remedy for this State-targeted command, section 1706 then provides that "[a]n individual denied an equal educational opportunity * * * may institute a civil action in an appropriate district court of the United States *against such parties*, and for such relief, *as may be*

appropriate" (emphasis added). The combined effect of these provisions is clear: "The 'appropriate parties' against whom such a civil action may be instituted are those upon whom the statutory obligations and prohibitions are imposed—namely, the 'State.' " *Stanley*, 879 F. Supp. at 1366. Thus, "[r]ead together, the text of 20 U.S.C. §§ 1703 and 1706, is specific enough to indicate clearly Congress' unequivocal intent to abrogate." *Savannah Board*, 1990 WL 608208, at *6.[12]

In *Fitzpatrick* v. *Bitzer*, 427 U.S. 445 (1976), this Court relied upon the language of section 5 of the Fourteenth Amendment—in which "Congress is expressly granted authority to enforce 'by *appropriate* legislation' the substantive provisions of the Fourteenth Amendment, which themselves embody significant limitations on state authority," *id.* at 456 (quoting section 5; emphasis added)—to hold that section 5 permits Congress to abrogate the Eleventh Amendment. Since section 1703 cannot be read as anything other than an express limitation on state authority, ("No State shall deny equal educational opportunity to an individual on account of his or her race"), a suit against a State must be a suit against an "appropriate" party under section 1706.[13]

The decision below is not contrary to *Atascadero* or *Dellmuth*. The statute at issue in *Atascadero* was the Rehabilitation Act, which at that time afforded relief against "any

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[12] Although Congress' intent to abrogate the Eleventh Amendment must be clearly expressed in statutory text, such a clear expression can be found in text lacking "explicit reference to state sovereign immunity or the Eleventh Amendment." *Dellmuth*, 491 U.S. at 233 (Scalia, J., concurring) (fifth vote for majority).

[13] *Cf. Winbush* v. *Iowa*, 66 F.3d 1471, 1483 (8th Cir. 1995) (holding that the provision of Title VII giving courts power to grant any "equitable relief as the court deems *appropriate*," 42 U.S.C. § 2000e-5(g)(1) (emphasis added), abrogates the Eleventh Amendment to allow awards of prejudgment interest on damages against States); *Pegues* v. *Mississippi State Employment Serv.*, 899 F.2d 1449, 1454 (5th Cir. 1990) (same).

recipient of Federal assistance." 29 U.S.C. § 794a(a)(2). The Court held that this "general authorization for suit in federal court" was insufficient to abrogate state sovereign immunity because it did not "subject the States to federal jurisdiction * * * specifically." 473 U.S. at 246. Sections 1703 and 1706, however, "do not simply authorize relief against a general, undefined class of defendants that may or may not include the state and its agencies." *Stanley*, 879 F. Supp. at 1366-67 n.16. Rather, section 1706 authorizes suits in federal court against "appropriate" parties and section 1703 "mentions specifically the state," *Savannah Board*, 1990 WL 608208, at *6, and "expressly contemplates that relief is to be obtained from the state." *Gomez*, 811 F.2d at 1038. Thus, there is no conflict between *Atascadero* and the Second Circuit's 1996 decision in this case. *See id.* at 1037-38 (distinguishing *Atascadero*); *Stanley*, 879 F. Supp. at 1366 n.16 (same); *Savannah Board*, 1990 WL 608208, at *6 (same).

Nor is the 1996 decision contrary to *Dellmuth*. As in *Atascadero*, the statute at issue in *Dellmuth*—the Education of the Handicapped Act ("EHA")—contained little more than a general authorization for suit in federal court. The Court rejected the attempt of the proponent of abrogation to distinguish *Atascadero* on the ground that "the EHA 'is replete with references to the states,' " 491 U.S. at 232 (quoting the respondent's brief), saying that this created nothing more than "a permissible inference" that the Congress intended for States to be amenable to suit in federal court. *Id.*[14] There is, however, nothing in the EHA akin to section 1703's express injunction against the States and section 1706's authorization of suit against "appropriate" parties—language that collectively creates much more than a mere permissible inference

[14] *But cf. Seminole Tribe*, 517 U.S. at 57 ("[T]he numerous references to the 'State' in the text of [the Indian Gaming Regulatory Act] make it indubitable that Congress intended through the Act to abrogate the States' sovereign immunity from suit").

that Congress intended abrogation. Thus, although the Court could say in *Dellmuth* that the EHA did not "address abrogation in even oblique terms" and "in no way intimate[d] that the States' sovereign immunity is abrogated," 491 U.S. at 231, the same certainly cannot be said here.

As noted, no court has reached a contrary conclusion. The issue, moreover, apparently arises so infrequently that no court of appeals has been called on to consider it since the Second Circuit's 1996 decision, and prior to that, in the preceding decade. Certiorari is not warranted on this issue.

2. The Second Circuit also held correctly that the State institutional defendants were liable under the EEOA. The State's submission that the Court should review this conclusion, Pet. 28-30, not only fails to cite a single case considering the EEOA question since the time of its 1997 petition but also fails to cite a case decided in the last 18 years. This fact alone demonstrates that the rarely-occurring question the State presents does not merit review here. In addition, there is no conflict implicated by the decision below, which is demonstrably correct in all events.

In the EEOA, Congress declared it to be the policy of the United States that "all children enrolled in public schools are entitled to equal educational opportunity without regard to race, color, sex, or national origin." 20 U.S.C. § 1701(a)(1). As noted above, section 1703 of the EEOA provides that "[n]o State shall deny equal educational opportunity to an individual on account of his or her race, color, or national origin, by * * * (b) the failure of an educational agency which has formerly practiced [race-based] deliberate segregation to take affirmative steps * * * to remove the vestiges of a dual school system." The EEOA defines the term "educational agency" as a "State education agency" or a "local educational agency." *Id.* at 1720(a).

Under the plain language of the EEOA, then, a State denies equal educational opportunity "by" the failure of a local

educational agency to eliminate the vestiges of segregation. Therefore, the Second Circuit correctly held that the principles articulated in *United States* v. *School District of Ferndale*, 577 F.2d 1339 (6th Cir. 1978), supported the imposition of liability on the State institutional defendants under the EEOA on the same facts that warranted the imposition of liability on the State officials under the Equal Protection Clause. *See* Pet. App. 113a-114a.

The State contends that the Second Circuit concluded that liability under section 1703(b) of the EEOA is broader than under the Fourteenth Amendment, Pet. 28, in conflict with *United States* v. *Texas*, 680 F.2d 356 (5th Cir. 1982). In that case, the Fifth Circuit held that evidence *insufficient* to establish an equal protection violation was also insufficient to establish an EEOA violation. Here, the Second Circuit held that evidence *sufficient* to establish an equal protection violation also established an EEOA violation. Pet. App. 115a. There is no logical inconsistency between these holdings. Moreover, the State is incorrect when it asserts that the Second Circuit held that the EEOA is broader than the Equal Protection Clause. Rather, it stated that "the EEOA provides protections *similar* to those provided by the Equal Protection Clause," *id.* at 112a (emphasis added), and found the EEOA violated "for the same reasons" it had found the constitutional provisions violated. *Id.* at 115a. Since the Second Circuit imposed liability under the EEOA based upon the same factual findings for which it imposed liability under the Equal Protection Clause, it is not necessary to the Second Circuit's decision for the EEOA to go beyond the Equal Protection Clause and the judgment below can stand even if that proposition is untrue.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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No. 99-1370

IN THE

Supreme Court of the United States

THE STATE OF NEW YORK, *et al.*,

Petitioners,

v.

YONKERS BOARD OF EDUCATION, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT CITY OF YONKERS, NEW YORK

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QUESTIONS PRESENTED

1. Whether the State of New York's petition improperly raises issues not addressed and resolved in the Second Circuit's most recent 1999 decision in this case, but that instead relate to issues addressed and resolved in the Second Circuit's earlier 1996 decision in this case, as to which certiorari review has been denied.

2. Whether in 1996 the Second Circuit correctly found the State defendants liable for contributing to segregation, applying well-established precedent to the amply supported factual findings in this case.

3. Whether the Second Circuit's 1996 holding that State liability is appropriate under the Equal Educational Opportunities Act is fully consistent with the decisions of this Court and the Courts of Appeals.

4. Whether the district court's apportionment of liability to fund a desegregation remedy between the State of New York and the City of Yonkers was well within the scope of its equitable remedial discretion.

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Appendix — Motion Of City Of Yonkers For Entry Of Order Requiring Remedial Relief From The Added State Of New York Defendants Dated May 15, 1997 ..... 1a

BRIEF IN OPPOSITION FOR RESPONDENT CITY OF YONKERS, *NEW YORK*

Respondent City of Yonkers, New York ("the City") respectfully asks this Court to deny the State of New York's petition for writ of certiorari filed in this cause on February 14, 2000. For the most part, the State's current certiorari petition is nothing more than a second attempt to seek certiorari review of issues that were resolved by the Second Circuit's 1996 decision in this case. In its 1996 opinion, the United States Court of Appeals for the Second Circuit properly concluded, given strong factual findings in the district court, that the State of New York and its officials were liable for school segregation in the City of Yonkers where the State petitioners: (1) knew of de jure school segregation in Yonkers, New York; and (2) "failed to exercise their authority and failed to fulfill their responsibility to take steps to achieve desegregation in Yonkers, and instead took actions that encouraged the perpetuation of segregation, because of their deference to the racially inspired positions of the local officials and the known anti-desegregation stance of other state officials." *United States v. City of Yonkers*, 96 F.3d 600, 618-19 (2d Cir. 1996) (Pet. App. at 109a). In 1997, the State filed a petition for writ of certiorari, challenging the Second Circuit's 1996 determination of State liability. This Court denied the State's 1997 certiorari petition on June 23, 1997. *New York v. Yonkers Board of Education*, 521 U.S. 1104 (1997).

The State now raises two of the very same issues previously raised in its 1997 certiorari petition under the pretext of seeking review of the Second Circuit's latest 1999 decision in this case. In its current certiorari petition, the State seeks review of only one issue addressed by the Second Circuit in its 1999 decision — the apportionment of liability for school desegregation. The remainder of the issues raised in the State's petition relate to issues resolved in the 1996 Second Circuit opinion — issues that were neither addressed nor revisited in the Second Circuit's most recent decision. The district court's apportionment of liability, affirmed by the Second Circuit, was well within the

equitable discretion of the district court and is amply supported by the factual record in this case. The Second Circuit's 1999 decision does not warrant this Court's review.

STATEMENT OF JURISDICTION

In their petition for writ of certiorari, the State petitioners challenge the Second Circuit's opinion and judgment entered on November 16, 1999, invoking the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1). Two of the three points raised in their petition, however, relate not to issues addressed and resolved in the Second Circuit's 1999 decision, but rather relate to issues addressed and resolved in the Second Circuit's earlier 1996 decision in this case. In 1997, the State sought certiorari review of that decision, and its petition was denied. *New York v. Yonkers Bd. of Educ.*, 521 U.S. 1104 (1997). Points I and III of the current petition (which relate to the 1996 decision) accordingly are not properly asserted in a petition asking this Court to review the Second Circuit's 1999 decision. This Court has jurisdiction to review the Second Circuit's 1999 decision pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

A. Initial Proceedings in the District Court.

In 1985, the United States District Court for the Southern District of New York found that the Yonkers Public Schools were unconstitutionally segregated. *United States v. Yonkers Bd. of Educ.*, 624 F. Supp. 1276 (1985) ("*Yonkers I*").[1] The district court found the City of Yonkers liable for discrimination in housing and education, found the Yonkers Board of Education ("Board") liable for school segregation and, in 1986, entered appropriate remedial orders. *See id.*; *United States v. Yonkers Bd. of Educ.*, 635 F. Supp. 1538 (S.D.N.Y. 1986) (School Desegregation Order) ("*Yonkers II*") and 635 F. Supp. 1577

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1. The City adopts the Second Circuit's short titles for the many decisions in this longstanding litigation.

(S.D.N.Y. 1986) (Housing Remedy Order). The Second Circuit affirmed these decisions, and this Court denied review. *United States v. Yonkers Bd. of Educ.*, 837 F.2d 1181 (2d Cir. 1987) ("*Yonkers III*"), *cert. denied*, 486 U.S. 1055 (1988).

In 1987, the NAACP moved to add the State of New York, certain State officials, and the New York State Urban Development Corporation ("UDC") as parties defendant. Pet. App. at 301a-313a. The Board similarly sought leave to file a cross-claim against these added State defendants. Pet. App. at 284a-300a. The NAACP and the Board alleged that the State defendants should be compelled to participate in the existing school and housing remedies and to assist in eliminating the vestiges of school segregation, because the State defendants had known of the de jure segregation in Yonkers and had the authority and duty to eliminate segregation, but had, through action and inaction, contributed to school and housing segregation in response to race-related political pressures. *See* Pet. App. at 284a-313a. Although denying that there were additional vestiges of segregation in the Yonkers Public Schools for which the City should be held responsible, the City supported the NAACP's and the Board's claims that the State defendants were liable for segregated conditions in Yonkers. *See* Pet. App. at 128a.

After some procedural delay and several interlocutory, immunity-based appeals by the State defendants, the district court severed the issues raised in the 1987 complaint and cross-claim for trials on the issues of: (1) whether unaddressed vestiges of unlawful segregation continue in the Yonkers Public Schools; (2) whether the State defendants are liable; and (3) what remedies are appropriate. After hearing evidence related to the vestiges issue, the district court determined that the Board had "achieved desegregation of enrollments among the schools," but that vestiges of segregation remained to be remedied. *See United States*

v. City of Yonkers, 833 F. Supp. 214, 216 (S.D.N.Y. 1993) ("*Yonkers IV*").[2]

In the spring of 1994, the district court held a six-week trial on the issue of whether the State defendants should be held liable for the segregated conditions found by the Court in its 1985 liability decision as well as for the vestiges of segregation in the Yonkers Public Schools. As the Second Circuit noted, "the [district] court received thousands of exhibits and received testimony from more than 30 witnesses, including members and former members of the New York Board of Regents, a former Commissioner, a former Deputy Commissioner, key officials from the State Education Department" and "City officials and community leaders who had interacted with [the State defendants] on school and housing matters." Pet. App. at 73a. The district court issued two liability opinions. The first included the bulk of its factual findings and addressed the claims against the State defendants under the Equal Protection Clause and 42 U.S.C. § 1983. *See United States v. City of Yonkers*, 880 F. Supp. 212 (S.D.N.Y. 1995) ("*Yonkers V*") (Pet. App. at 123a-184a). The second addressed the claims against the State defendants under Title VI and the Equal Educational Opportunity Act ("EEOA"). *See United States v. City of Yonkers*, 888 F. Supp. 591 (S.D.N.Y. 1995) ("*Yonkers VI*") (Pet. App. at 185a-204a).

B. The District Court's 1995 Opinions.

In its first State liability opinion, the district court made extensive factual findings based upon the evidence it had heard and received during the 1994 State liability trial. In both their 1997 and 1999 certiorari petitions, the State defendants largely have ignored these findings because, as the Second Circuit noted, these findings were "largely favorable to plaintiffs."

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2. At the time of the 1996 appeal, the district court's vestiges decision had not yet been embodied in a final judgment and, therefore, was not before the Second Circuit on appeal. Pet. App. at 72a. On remand in 1997, the district court addressed the vestige issues and remedial issues as explained herein.

See Pet. App. at 73a. Indeed, the State defendants challenged only one of these factual findings in their 1996 appeal. *See* Pet. App. at 99a.

In 1995, the district court found that the State defendants "knew of the segregation in Yonkers, had actual or constructive knowledge that this segregation was de jure, had the power to take steps to remedy that segregation, and refused to exercise that power because they were capitulating to political pressures that they knew were racially motivated." *See* Pet. App. at 96a-97a. In 1996, the Second Circuit affirmed these factual findings and summarized them, as follows:

> In detail, the district court found, *inter alia,* that
>
> > — the State was aware of circumstances that should have alerted it to Yonkers's unlawful segregation of its schools, and "if in fact the State defendants were not so alerted, it was because they themselves chose to remain ignorant" "in the face of actual conflicting evidence,"
>
> *Yonkers V*, 880 F. Supp. at 219, 220;
>
> > — the State had "actual or constructive[ ] knowledge of illegal racial segregation in the Yonkers public schools,"
>
> *id.* at 220;
>
> > — the State had "full knowledge of the nature, cause and extent of the segregation in the Yonkers public schools,"
>
> *id.* at 245;
>
> > — the State "knew that Yonkers," "if left to its own devices, was not going to remedy the segregation voluntarily,"

id. at 219, 220. The court also found, *inter alia*,

> — that in other communities, Commissioner Nyquist had "not hesitate[d] to enforce the [New York] racial integration policy,"

id. at 225;

> — that the legislature responded to Nyquist's desegregation efforts with a statute that "prohibited State education officials, as well as local school districts with appointed school boards, from assigning students for the purpose of achieving racial balance or of taking other desegregative actions,"

id.;

> — that, after that statute was declared unconstitutional, the legislature took other actions whose "purpose and intended effect" were "similar" and "had the cumulative effect of undermining efforts to reduce school segregation,"

id.;

> — that the legislature also adopted "a new practice" of having candidates for the Board of Regents be "interviewed prior to appointment by legislators . . . who were known to be hostile to vigorous desegregation efforts,"

id.;

> — that the Regents revised their policy statement on segregation so as to "dilute[ ] [its] pro-desegregation force,"

id.;

> — that this revision was a response to "criticism of Commissioner Nyquist's vigorous desegregation efforts,"

id.;

> — that the Board of Regents lobbied for legislation providing for stricter judicial review of the Commissioner's § 310 orders in an effort to "rein in Nyquist's desegregation efforts,"

id. at 226; and

> — that the Board of Regents finally simply fired Nyquist; "[h]is views on [integration] were a substantial factor leading to his discharge,"

id.

United States v. City of Yonkers, 96 F.3d at 614 (Pet. App. at 97a-99a) (omissions and alterations in original).[3]

Notwithstanding these strong factual findings, the district court stated that it was "constrained" to find that the State defendants were not liable under the district court's interpretation of the Second Circuit's opinion in *Arthur v. Nyquist*, 573 F.2d 134 (2d Cir.), *cert. denied*, 439 U.S. 860 (1978). Pet. App. at 183a. In essence, the district court believed that proof of specific approval and support of local authorities' unlawful conduct, and not mere knowing inaction or action, was necessary to impose liability upon the State defendants under *Arthur*. *See* Pet. App. at 163a-164a. The district court explained, however, that it reached this conclusion "with

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3. In their Statement of the Case, the State petitioners present factual arguments regarding alleged efforts of the State with regard to desegregation. Pet. at 7-8. These "facts" were not found by the district court and are, indeed, directly contrary to the actual findings of the district court described above, as affirmed by the Second Circuit. State petitioners improperly raise these factual arguments here.

reluctance," because it found "entirely unpersuasive" the State defendants' arguments that they lacked full knowledge of the nature, cause and extent of segregation in the Yonkers Public Schools, and that they "lacked the power to address adequately the problem of school segregation." Pet. App. at 183a.

In its second liability opinion, the district court addressed issues concerning State liability under Title VI and the EEOA. Based largely upon its interpretation of *Arthur v. Nyquist*, the district court similarly held that the State defendants were not liable for school segregation under these statutes. *See* Pet. App. at 187a-204a.

C. The Second Circuit's 1996 Decision.

In 1996, the Second Circuit determined that the district court's 1995 findings of fact were supported by the evidence; concluded that those findings distinguished the *Yonkers* case from the *Arthur* decision and warranted the imposition of State liability; and vacated the district court's dismissal of the equal protection and EEOA claims against the State defendants. *United States v. City of Yonkers*, 96 F.3d 600 (2d Cir. 1996). The Second Circuit began its analysis of the equal protection claims by restating well-established "fundamental principles governing equal protection claims" that the Second Circuit had previously set forth in its consideration of City and Board liability in the first *Yonkers* appeal. Pet. App. at 91; *see Yonkers III*, 837 F.2d at 1216-17, 1222-26. The Court of Appeals explained that a plaintiff must show that the State action complained of was motivated at least in part by a racially discriminatory purpose. *Id.* The Court then repeated its *Yonkers III* holding that "the foreseeability of a segregative effect, or 'adherence to a particular policy or practice, with full knowledge of the predictable effects of such adherence upon racial imbalance,' is a factor that may be taken into account in determining whether acts were undertaken with segregative intent." Pet. App. at 93a (quoting *Yonkers III* , 837 F.2d at 1227 (other internal quotation marks omitted)).

After thoroughly reviewing the evidence before the district court, the Second Circuit concluded that "the record evidence amply supports the district court's finding that the State defendants had full knowledge of the nature, cause, and extent of the segregation in the Yonkers schools, and that they knew or should have known that the school segregation in Yonkers was de jure." Pet. App. at 102a. The Court of Appeals explained that these "amply supported factual findings" distinguished the case from *Arthur v. Nyquist*, because in *Arthur* there had been insufficient evidence to show that the State officials had abdicated their duty to attempt to achieve desegregation. *United States v. Yonkers*, 96 F.3d at 617 (Pet. App. at 105a-106a). The Second Circuit accordingly concluded that the State defendants' knowledge of Yonkers segregation, their failure to exercise their authority and responsibility to achieve desegregation in Yonkers, and their actions and omissions taken in reaction to "racially inspired positions of the local officials and the known anti-desegregation stance of other state officials" were a sufficient basis for liability under § 1983 for prospective injunctive relief to remedy vestiges of school segregation in Yonkers. *Id.* at 618-19 (Pet. App. at 106a-109a).

The Court of Appeals similarly held that the State defendants were liable under the EEOA. The Court reasoned that the EEOA imposed "on States the obligation to enforce the equal-educational-opportunity obligations of local educational agencies," and provided protections similar to those provided by the Equal Protection Clause. *Id.* at 620 (Pet. App. at 112a-116a). Because it had found the State defendants liable under Section 1983 and the EEOA, the Court of Appeals declined to address the plaintiffs' Title VI claims. *See id.* at 621. (Pet. App. at 116a).

The Second Circuit vacated the judgment of the district court, which had dismissed the claims against the State defendants, and remanded the case for further proceedings. *Id.* at 623 (Pet. App. at 120a). The Second Circuit denied the State's request for en banc consideration. Pet. App. at 121a-122a.

The State then petitioned this Court for a writ of certiorari. That 1997 certiorari petition raised two of the very same issues raised in the 2000 certiorari petition currently before the Court. The Court denied the 1997 petition on June 23, 1997. *New York v. Yonkers Bd. of Educ.*, 521 U.S. 1104 (1997).

D. 1997 Proceedings in the District Court.

1. The District Court's Vestiges/EIP II Order.

Having determined in its 1993 interlocutory opinion that unremedied vestiges of segregation remained in the Yonkers Public Schools, *see* Pet. App. 205a-246a, and having received the mandate finding the State defendant officials liable for school desegregation, the district court proceeded to a hearing on the remedy for the vestiges in September 1997.,

In an opinion and order released on October 8, 1997, the district court found that the vestiges of segregation identified in its 1993 Opinion continue and "are traceable to the prior dual school system that was established and maintained in substantial part by acts or omissions of the State." Pet. App. at 42a-44a. The court also made the findings necessary to impose liability on the State under the EEOA, 20 U.S.C. § 1706. Pet. App. at 44a-48a.

The Court received into evidence and ultimately approved the Educational Improvement Plan II ("EIP II"), a further educational remedial plan prepared by the YBOE as an overall improvement plan for the YPS that would eliminate the vestiges identified by the district court in 1993. EIP II was described as "a broad framework which required additional planning on a school by school basis." Pet. App. at 59a. The court received no alternative proposals and directed that the YBOE move forward with planning for implementation of EIP II. Pet. App. 54a-65a.

The State defendants appealed the October 14, 1997 judgment. On February 2, 1998, the district court amended its prior order to make the judgment final under Rule 54(b),

Fed. R. Civ. P. The State defendants then filed an Amended Notice of Appeal.

2. The District Court's Order Apportioning Liability.

Also following the Second Circuit's finding of State liability in its 1996 decision, on May 15, 1997, the City raised by motion with the district court the issue of the State's participation in the existing EIP I remedy. City App. at 1a.[4] Given the finding of State liability, the City sought an order confirming that the "State defendants are jointly liable with the City of Yonkers to provide the necessary funding to fully implement the 1986 School Desegregation Order." City App. at 6a. The district court directed the Monitor to conduct a hearing to determine the portion of "EIP I related costs which the State Defendants should bear." Jt. App. at 591-92.[5]

Following a three-day hearing, the Court Monitor issued an Advisory Opinion which ultimately was approved and adopted by the district court. Jt. App. at 224-52. The Monitor found that certain programs could be identified that most directly furthered the EIP I remedy. Those program costs amounted to just under $50 million for the 1996-97 fiscal year. *Id.* at 233-34. However, the Monitor found that it was difficult to determine with precision the total cost of EIP I because the programs of EIP I were intertwined with all school functions of the Yonkers Public Schools. *Id.* at 235-36. The Monitor further acknowledged his prior view that "EIP I costs are not readily mutually exclusive of much of the basic costs of the District," but recognized that the need for a fully funded EIP I was overriding. *Id.* at 235.

While the State claimed it already provided funding for EIP I through general annual legislative appropriations to school

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4. That motion is included in the City's appendix to this brief.

5. This order and the Monitor's Advisory Opinion were not included in the Petitioners' Appendix. Citations to "Jt. App." are citations to the Joint Appendix filed in the Second Circuit.

districts, the Monitor found that the complexities of the State funding formula and disputes over the extent to which the State was providing incremental funds for EIP I rendered the question hopelessly complicated. Jt. App. at 236. The Monitor concluded that ongoing disputes over each party's contribution to the remedy would only serve to impair its efficient implementation. *Id.* at 236-37. The Monitor found that both the City and the State had the financial capacity to fund EIP I although "the City of Yonkers has come close to saturating its ability to cover the costs of EIP I . . . " *Id.* at 233. Under such circumstances, the Monitor found that prospectively the City and State should share the costs of EIP I and the YBOE budget equally and receive full credit for all of their ongoing contributions to education funding. *Id.* at 236.

The Monitor constructed a model for provision of additional funding due from the State for FY 96-97 (the "short-term remedy") as well as a long-term model to ensure equal provision by the City and State of funding for the YPS budget and EIP I and long term stability of the YPS to further the efficient implementation of the remedy. Jt. App. at 246-51.

The district court approved the Monitor's recommendations and adopted the Advisory Opinion. Pet. App. 33a-35a. The State defendants appealed the district court's order, dated February 10, 1998, which apportioned liability equally between the City and the State. *See id.* That appeal was consolidated with the State's appeal of the vestiges/EIP II order.

E. The Second Circuit's 1999 Decision.

On June 22, 1999, the Second Circuit issued its initial decision in the State's consolidated appeal. In that opinion, the court: (1) reversed the district court's vestiges findings and vacated the EIP II remedial order; and (2) affirmed the order apportioning liability between the State defendants and the City. *See United States v. City of Yonkers*, 181 F.3d 301 (2d Cir. 1999). The panel majority concluded that the record did not support any alternative findings of vestiges other than the two specified

by the district court, and accordingly reversed on the vestiges issue. In partial dissent, Judge Sack disagreed as to this latter point and argued that the vestiges issue should be remanded to the district court for further findings on the present record as to whether there were alternative remaining vestiges. *See* 181 F.3d at 321-30.

Granting a petition for panel rehearing, the Second Circuit panel revised its opinion to provide for such a remand, stating that it was

> convinced by Judge Sack's view, expressed in partial dissent to our initial opinion on this appeal, that it is prudent to ask the district court to make further findings on the present record and in light of this opinion as to whether — or not — there are remaining vestiges of segregation in the Yonkers School System, and if so what they are and what record evidence is relied on for support.

United States v. City of Yonkers, 197 F.3d 41 (2d Cir. 1999). In the November 1999 opinion (which is the subject of this certiorari petition), the Second Circuit: (1) vacated the district court's order containing findings of vestiges and the further EIP II remedy; and (2) again affirmed the district court's order apportioning liability between the State defendants and the City. Consistent with Judge Sack's earlier opinion, the panel then remanded as follows:

> To accomplish the remand for that purpose, we grant the petition for rehearing, vacate our prior opinion, decide the appeal by this opinion, remand for a limited purpose, and provide for automatic restoration of appellate jurisdiction without a new notice of appeal. *See United States v. Falameh*, 84 F.3d 47, 50 (2d Cir. 1996); *United States v. Jacobson*, 15 F.3d 19, 22 (2d Cir. 1994).

United States v. City of Yonkers, 197 F.3d at 46. Those vestiges issues are currently back before the district court on remand.

With regard to the district court's apportionment of liability, the Second Circuit rejected the State's capacity and standing arguments, and affirmed the district court's liability apportionment. *See id.* at 57-58. The Second Circuit explained that the "district court has broad equitable discretion to apportion remedial costs among joint tort feasors." *Milliken v. Bradley*, 433 U.S. 267, 288-91 (1977). Reviewing the record, the Second Circuit affirmed the district court's apportionment of liability, concluding that the district court had neither clearly erred nor abused its broad remedial discretion in apportioning liability and compliance costs on an equal basis between the City and the State. *Id.* at 58.

In its 1999 opinion, the Second Circuit did not revisit its 1996 conclusion that the State defendants were liable for segregation in the Yonkers Public Schools. *See United States v. City of Yonkers*, 96 F.3d 600 (2d Cir. 1996). In fact, the Second Circuit remarked that that phase of the litigation was "not directly relevant to this [1999] appeal." *United States v. City of Yonkers*, 197 F.3d at 48.

In their current certiorari petition, the State petitioners again ask this Court to review the Second Circuit's 1996 liability determination. Those issues were resolved in 1996 and 1997 and are not properly before this Court. In its petition, the State also asks the Court to review the Second Circuit's 1999 apportionment of liability. For the reasons stated herein, that determination was well within the district court's equitable remedial discretion and does not merit certiorari review.

REASONS FOR DENYING THE WRIT

I. IN 1996, THE SECOND CIRCUIT CORRECTLY FOUND THE STATE DEFENDANTS LIABLE FOR CONTRIBUTING TO SEGREGATION, APPLYING WELL-ESTABLISHED PRECEDENT TO THE AMPLY SUPPORT FACTUAL FINDINGS IN THIS CASE.

In Point I of their current petition for writ of certiorari, the State petitioners again ask this Court to review the Second Circuit's 1996 determination that the State of New York is liable for contributing to segregation in the Yonkers Public Schools. Point I of the current certiorari petition is virtually identical to Point I of the State's 1997 certiorari petition. The Second Circuit resolved the issue of State liability in its 1996 opinion. *See United States v. City of Yonkers*, 96 F.3d 600 (2d Cir. 1996). The State sought certiorari review; its petition was denied. The Second Circuit did not address or revisit this issue in either of its 1999 opinions. Simply put, nothing has changed the fact that the Second Circuit's 1996 determination of State liability was consistent with well-established precedent and amply supported by the district court's factual findings in this case. The Second Circuit's 1996 decision still does not merit this Court's review.

Given the district court's "amply supported factual findings," there is nothing remarkable about the Second Circuit's 1996 finding of State liability. This Court has clearly held that liability exists where the state action complained of was taken with the intent to discriminate. *See Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977); *Washington v. Davis*, 426 U.S. 229 (1976). A plaintiff must establish that race was "a motivating factor," and can do so in several ways. The Second Circuit has now twice discussed in this case the circumstances under which state action or inaction taken in response to racially motivated political pressure can serve as a basis of liability. *See Yonkers III*, 837 F.2d at

1216-18, 1221-27; Pet. App. at 91a-96a. In *Yonkers III*, the Court of Appeals stated that "adherence to a particular policy or practice, with full knowledge of the predictable effects of such adherence upon racial imbalance, is a factor that may be taken into account in determining whether acts were undertaken with segregative intent," *Yonkers III*, 837 F.2d at 1227 (internal quotation marks omitted), and concluded "that the forbidden segregative intent was established where governmental defendants took actions in response to and in accordance with community pressures that they knew were racially motivated." Pet. App. at 93a. These standards of liability are well-established and not disputed, although they are largely ignored in the State's petition. *See* Pet. at 17-21.

In its 1996 decision, the Second Circuit did nothing more than apply these precedents to the "amply supported factual findings" in this case. The Second Circuit concluded that "the record evidence amply supports the district court's finding that the State Defendants had full knowledge of the nature, cause, and extent of the segregation in the Yonkers schools, and that they knew or should have known that the school segregation in Yonkers was de jure." Pet. App. at 102a. The record is replete with evidence that officials of the State Education Department ("SED") had abundant contact with the Yonkers Public Schools, knew of the unremedied segregation in the schools, and reacted to state and local opposition to desegregation. *See* Pet. App. at 96a-109a. The Court of Appeals also determined in 1996 that there was "ample support" for the district court's "finding that the failure of SED officials to take action toward desegregation in Yonkers, though they took remedial action in other cities, was the result of heavy pressure from the New York State legislature." Pet. App. at 102a-103a.

In their petition, the State petitioners seek to recharacterize the findings of the district court by arguing that State liability in this case was based solely on "constructive knowledge" and the State's "failure to take affirmative remedial steps." Pet. at 17-21. The State, however, ignores both the Second Circuit's and the district court's determination that State officials both acted and failed to act in response to racially motivated political pressures. The district court specifically found that the New York Legislature had passed legislation intended to undermine efforts to reduce school desegregation; that the Legislature sought to have candidates for the Board of Regents interviewed by "legislators . . . who were known to be hostile to vigorous desegregation efforts"; and that the Board of Regents fired Education Commissioner Nyquist and that "[h]is views on [integregation] were a substantial factor leading to his discharge." Pet. App. at 99a.

State liability here is not based on mere inaction. Rather, it is grounded in the trial and appellate courts' determination that State officials had full knowledge of school segregation in Yonkers and that those State officials

> failed to exercise their authority and failed to fulfill their responsibility to take steps to achieve desegregation in Yonkers, and instead took actions that encouraged the perpetuation of segregation, because of their deference to the racially inspired positions of the local officials and the known anti-desegregation stance of other state officials.

Pet. App. at 109a.

Throughout their argument, the State petitioners suggest that their actions and inaction were not causally related to the continuing segregation in the Yonkers Public Schools and that the State had "no affirmative complicity in causing such segregation." Pet. at 21. This contention is incorrect and directly contrary to the findings of the district court. In the portion of its findings entitled "The Effect on Yonkers of the State's Failure

to Intervene," the district court very carefully detailed its findings concerning the causal relationship between State action and inaction and the continuing segregation. *See* Pet. App. at 147a-149a. The district court expressly found that "there is every reason to believe that had the State brought its coercive powers to bear in Yonkers, Yonkers would have complied with its directions," Pet. App. at 147a; that the State defendants "altered the balance of power between the forces in Yonkers favoring reform and the forces in Yonkers opposing reform," *id.*; and that by delaying funding for desegregation, the State "enabled opposition to the reform efforts to coalesce to a point where the [Board] became hostile to the very desegregation initiative it had originally commissioned." Pet. App. at 149a. Additionally, the district court concluded that the Board of Regents' firing of Commissioner of Education Ewald Nyquist, which the court found to be based on Nyquist's pro-desegregation positions, "bolstered those in Yonkers who hoped that the State would in fact leave Yonkers alone." Pet. App. at 148a. The State did not challenge these factual findings on appeal in 1996, *see* Pet. App. at 99a; in any event, the Second Circuit in 1996 found that the district court's factual findings were amply supported by the extensive record in this case. There can be little doubt that the district court determined — as a matter of fact — that the State's action and inaction contributed to and perpetuated school segregation in the Yonkers Public Schools.

In 1996, consistent with well-established precedent and the factual findings of the district court, the Court of Appeals correctly concluded that the State officials were liable under the Fourteenth Amendment and § 1983 for prospective injunctive relief to remedy school segregation in Yonkers for which they were responsible. This fact-intensive determination does not break new ground or merit review by this Court. The State has once before asked this Court to review the issue. The Court denied that first petition in 1997 and should likewise deny the current petition.

II. THE SECOND CIRCUIT'S 1996 HOLDING THAT STATE LIABILITY WAS APPROPRIATE UNDER THE EEOA IS FULLY CONSISTENT WITH THE DECISIONS OF THIS COURT AND THE COURTS OF APPEALS.

In Point III of their current petition for writ of certiorari, the State petitioners again argue that imposition of State liability under the Equal Educational Opportunities Act ("EEOA"): (a) violates the State's Eleventh Amendment immunity; and (b) misreads the language of the EEOA. Again, these arguments are identical to arguments raised in the State's 1997 petition. For the same reasons that those arguments did not merit review then, they do not merit review now.

A. The Second Circuit's holding that the EEOA expressly abrogates the State's Eleventh Amendment immunity to the extent necessary to effectuate the purposes of the EEOA is correct and consistent with the decisions of this Court and the Courts of Appeals.

As an initial matter it is important to note that the State seeks to apply Eleventh Amendment immunity to frustrate the Second Circuit's determination that the State is liable for school segregation and should participate in a remedy. To the extent that the Second Circuit's opinion requires the State to participate in the remedial desegregation efforts in Yonkers, it merely provides prospective injunctive relief consistent with this Court's decision in *Milliken v. Bradley*, 433 U.S. 267 (1977). In *Milliken*, as here, the State defendants — who were found liable for school segregation — argued that the Eleventh Amendment prevented the federal court from requiring the State to participate in the desegregation remedy. This Court flatly rejected that argument, as follows:

> The decree to share the future costs of educational components in this case fits squarely within the prospective-compliance exception

> reaffirmed by *Edelman*. That exception, which had its genesis in *Ex parte Young*, 209 U.S. 123 [(1908)], permits federal courts to enjoin state officials to conform their conduct to requirements of federal law, notwithstanding a direct and substantial impact on the state treasury. The order challenged here does no more than that. The decree requires state officials, held responsible for unconstitutional conduct, in findings which are not challenged, to eliminate a de jure segregated school system.

Id. at 289 (citation omitted). The Court concluded that "such prospective relief is not barred by the Eleventh Amendment." *Id.* at 290. That is also the case here.

Even if such relief fell within the scope of Eleventh Amendment immunity, it is clear that Congress has appropriately abrogated that immunity as necessary to enforce the provisions of the EEOA. From the face of the statute, it is clear that Congress enacted the Equal Educational Opportunities Act pursuant to its authority under § 5 of the Fourteenth Amendment to enforce the provisions of the Fourteenth Amendment. *See Castaneda v. Pickard*, 648 F.2d 989, 1008 n.9 (5th Cir. 1981). This Court has explained that "Congress may, in determining what is 'appropriate legislation' for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts." *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976) (citations omitted). The present statute, the EEOA, represents Congress' statutory means of enforcing the provisions of the Fourteenth Amendment as against the States in the school desegregation context.

The State of New York, however, claims that the application of the EEOA to the State in this case runs afoul of the Eleventh Amendment and of the clear-statement rule announced and explained in *Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985), and subsequent decisions of this Court. In

Atascadero, this Court held that "Congress may abrogate the State's constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute." *Id.* at 242. In subsequent decisions, this Court has further explained that congressional intent to abrogate Eleventh Amendment immunity must be both "unequivocal" and "textual." *See, e.g., Kimel v. Florida Bd. of Regents*, 145 L. Ed. 2d 522 (2000); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996).

The EEOA and its prohibitions are specifically and pointedly addressed to the States. Even under this Court's strict clear-statement rule, Congress' intent to abrogate Eleventh Amendment immunity as to the EEOA is both unequivocal and textual. In the decision below, the Second Circuit correctly held that the EEOA expressly abrogates "the states' Eleventh Amendment immunity to the extent necessary to effectuate the purposes of the EEOA," reasoning as follows:

> The EEOA (or the "Act") provides that "[n]o state shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin." 20 U.S.C. § 1703 (emphasis added). Further, the Act forbids the state to perpetrate such a denial through various acts or omissions of an educational agency." *See id.* §§ 1703(a)-(f). The Act defines "educational agency" as "a local educational agency or a 'State educational agency'" *id.* § 1720(a) (emphasis added); *see also Idaho Migrant Counsel v. Board of Education*, 647 F.2d 69, 71 (9th Cir. 1981) (educational agency as used in EEOA includes a "State Board of Education").

United States v. Yonkers, 96 F.3d at 619 (Pet. App. at 110a). The Second Circuit explained that the text of the EEOA explicitly provided that "[n]o state" shall engage in the prohibited conduct and expressly applied the EEOA prohibitions and remedies to "State Educational Agencies." Pet. App. at 110a-116a.

The Second Circuit's decision is consistent with the decisions of the two other Circuits that have addressed this issue. For instance, in *Gomez v. Illinois State Board of Education*, 811 F.2d 1030 (7th Cir. 1986), the Seventh Circuit engaged in the textual analysis required by *Atascadero* and its progeny and determined that the language of the EEOA plainly abrogated Eleventh Amendment immunity. The court reasoned that the EEOA specifically prohibited "states" from denying equal educational opportunities to individuals and imposed its restrictions and remedies directly on state educational agencies. *Id.* at 1037-38. The Ninth Circuit likewise has held that "the Equal Educational Opportunities Act clearly authorizes desegregation suits against state educational agencies," and abrogates Eleventh Amendment immunity. *Los Angeles Branch NAACP v. Los Angeles Unified School District*, 714 F.2d 946 (9th Cir. 1983), *cert. denied*, 467 U.S. 1209 (1984). *See also Idaho Migrant Counsel v. Board of Education*, 647 F.2d 69 (9th Cir. 1981). To hold otherwise would mean that Congress through the EEOA intended to impose the obligations of the EEOA on the States and their agencies, but did not intend to make the States and their agencies proper parties defendant under the terms of the EEOA. Such a reading of the statute makes little sense.

Here, as in *Milliken*, the Second Circuit has found the State liable for school segregation and now requires it to participate in prospective injunctive relief to remedy any vestiges of school segregation in Yonkers. Such relief falls squarely within the prospective-compliance exception reaffirmed by *Edelman v. Jordan*, 415 U.S. 332 (1974), and *Milliken*, notwithstanding an impact upon the state treasury. The Second Circuit's decision is consistent with the decisions of this Court and with the decisions of the Courts of Appeals and does not merit review.

B. The Second Circuit's imposition of liability against the State under the EEOA is consistent with the plain language of the statute and the previous decisions of the Courts of Appeals.

As they did in their 1997 petition, the State petitioners also contend that imposition of liability against the State under the EEOA is inconsistent with the language of the statute and the Fifth Circuit's opinion in *United States v. State of Texas*, 680 F.2d 356 (5th Cir. 1982). Even a cursory reading of the statute and that case shows that the State misunderstands both.

The EEOA provides that:

> No State shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by —
>
> (a) the deliberate segregation by an educational agency of students on the basis of race, color, or national origin among or within schools;
>
> (b) the failure of an educational agency which has formerly practiced such deliberate segregation to take affirmative steps . . . to remove the vestiges of a dual school system . . .

20 U.S.C. § 1703; Pet. App. at 356a-357a. The Second Circuit correctly held that the EEOA "provides substantive protections that 'considerabl[y] overlap . . . those provided under the Fourteenth Amendment.' " Pet. App. at 112a (quoting *United States v. School District of Ferndale, Michigan*, 577 F.2d 1339, 1346 (6th Cir. 1978)). *Accord Castaneda v. Pickard*, 648 F.2d 989, 1001 (5th Cir. 1981). The Second Circuit explained that the EEOA also imposes on States the obligation to enforce the equal educational opportunity obligations of its state and local educational agencies. Pet. App. at 112a. The Second Circuit's decision here is consistent with both the decision of the Sixth Circuit in *School District of Ferndale* and the decision of the Fifth Circuit in *Castaneda*. The State points to no case contrary

to this holding. Indeed, even the district court in this case explained that "it can be argued that if one were to set about to write a statute in a way that provided for vicarious State liability, one could not find language that was more clear and direct than that contained in §1703 of the EEOA." Pet. App. at 172a. The State's imaginative reading of this statute does not warrant this Court's review.

The State also seeks this Court's review based upon an imagined conflict between the Second Circuit's decision here and the Fifth Circuit's decision in *United States v. State of Texas*, 680 F.2d 356 (5th Cir. 1982). The Fifth Circuit's decision in *United States v. State of Texas* was based on a truly bizarre set of facts. *See id.* at 370 ("The case is unique, and we proceed to the resolution of its appeal without great assurance or satisfaction."). In that case, the district court had based its finding of liability upon a stipulation that had been entered into by an inexperienced Assistant Attorney General who acted "without authority from her client and, in fact, in general disregard of its instructions to her." *Id.* at 368. The Fifth Circuit concluded that "a proceeding so fundamentally flawed" could not serve as a basis for liability or for the remedial orders entered by the district court. *Id.* The Fifth Circuit's decision in *United States v. State of Texas* was fact intensive and in no way conflicts with the considered legal holdings of the Second Circuit in this case, which were based on "amply supported factual findings" in the district court. The State here attempts to create a conflict where there is none.

III. THE DISTRICT COURT'S APPORTIONMENT OF LIABILITY WAS WELL WITHIN THE SCOPE OF ITS EQUITABLE REMEDIAL DISCRETION.

In Point II of their current certiorari petition, the State petitioners challenge the district court's apportionment of liability between the State and the City. Contrary to petitioners' argument, the district court's apportionment of liability is grounded in the district and appellate courts' determination of

State liability and in the district and appellate courts' determination that the State defendants/petitioners as joint tortfeasors now must participate in the EIP I remedy.

The district court's broad equitable discretion to allocate liability for a school desegregation remedy among joint tortfeasors is not in question. As the Second Circuit explained, a "district court has broad equitable discretion to apportion remedial costs among joint tort feasors." Pet. App. at 30a (citing *Milliken*, 433 U.S. at 288-91). Consistent with principles of joint and several liability, the district court's equitable remedial discretion necessarily includes the authority to allocate financial burdens among joint tort feasors to ensure that the Court's remedies are fully funded. *See Missouri v. Jenkins*, 495 U.S. 33, 53-54 (1990) (holding that the district court had not abused its discretion in requiring both the school district and the State to share desegregation costs). As the Second Circuit also stated, "in apportioning costs, courts will assess both ability to pay and relative degrees of fault, but the overriding concern is that the remedy be fully funded." Pet. App. at 30a. Here, the district court "found that the City and State were equally responsible for segregation in Yonkers, and that the sharing formula assessed a 'fair and proportionate' burden on the levels of government, given their ability to pay." Pet. App. at 31a. In affirming the district court, the Second Circuit did nothing more than apply very basic standards of review and conclude that the district court had neither clearly erred nor abused its broad remedial discretion in apportioning compliance costs. *Id.*

Nevertheless, the State argues that its responsibility for funding the EIP I remedy has somehow come to an end because issues concerning the EIP II remedy and related vestiges issues are now back before the district court on remand. In so arguing, the State confuses its established and continuing liability and responsibility (as an adjudicated joint tortfeasor) for participating in the EIP I remedy with the EIP II issues currently on remand. As explained above in the Statement of the Case, in 1985 the district court found the City and the Board liable for

school segregation and, in 1986, entered appropriate remedial orders. *See United States v. Yonkers Board of Education*, 635 F. Supp. 1538 (S.D.N.Y. 1986). Specifically, the district court directed implementation of the EIP I remedy. That remedy order remains in effect to this day. In its 1996 decision, the Second Circuit held that the State defendants were also liable for school desegregation and should participate in the remedy. *United States v. City of Yonkers*, 96 F.3d at 618-19 (Pet. App. at 109a). The district court's February 10, 1998 order merely confirms the State's responsibility for implementing the initial desegregation remedy (EIP I) and allocates liability for that remedy between the State and the City. *See* Pet. App. at 33a-35a. None of the findings that support the State's liability for the EIP I remedy has been disturbed by subsequent district court and appellate proceedings. Nothing in the Second Circuit's decision and remand concerning the EIP II order affects the State's responsibility for the initial EIP I remedy.

What the State is really asking this Court to do is to make a finding of unitariness — in the first instance — that would bring jurisdiction over this case to an end. The State has not filed in the district court a motion for a finding of unitariness — or even a motion for a finding of partial unitary status. Additionally, the vestige and further remedial issues related to the EIP II order remain pending in the district court on remand from the Second Circuit. Without first raising unitariness issues in the district court, the State asks this Court to end State participation in the original school desegregation remedy in this case. The State glibly states that "the fact that the courts have not formally entered a declaration that the Yonkers School System is unitary is immaterial." Pet. App. at 23. The State's argument in this regard is plainly contrary to this Court's decisions in *Board of Education v. Oklahoma City Public Schools v. Dowell*, 498 U.S. 237 (1991), *Freeman v. Pitts*, 503 U.S. 467 (1992), and *Missouri v. Jenkins*, 515 U.S. 70 (1995), which instruct as to the appropriate means whereby a defendant may seek the withdrawal and termination of federal jurisdiction

over a school desegregation remedy. The State's latest petition for certiorari asserts no good reason why the Court should review the Second Circuit's latest decision in this case.

CONCLUSION

The Second Circuit's 1996 decision in this case was entirely consistent with the decisions of this Court and the Courts of Appeals, and was supported by the district court's clear factual findings. Similarly, the Second Circuit's 1999 decision appropriately affirmed the district court's apportionment of liability as within the district court's equitable remedial discretion. The State has for too long endeavored to avoid its responsibility to participate in the desegregative efforts of the Yonkers Public Schools. The City of Yonkers respectfully asks this Court to deny the State's petition for writ of certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX — MOTION OF CITY OF YONKERS FOR ENTRY OF ORDER REQUIRING REMEDIAL RELIEF FROM THE ADDED STATE OF NEW YORK DEFENDANTS DATED MAY 15, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

80 CIV 6761 (LBS)

UNITED STATES OF AMERICA,

Plaintiff,

YONKERS BRANCH — NAACP, et al.,

Plaintiffs-Intervenors,

v.

YONKERS BOARD OF EDUCATION, et al.,

Defendants.

MOTION OF CITY OF YONKERS FOR ENTRY OF ORDER REQUIRING REMEDIAL RELIEF FROM THE ADDED STATE OF NEW YORK DEFENDANTS

Defendant City of Yonkers moves the Court for entry of an order requiring the added State of New York defendants to provide remedial relief to the City of Yonkers and the Yonkers Board of Education to ameliorate the segregated conditions found by this Court in its 1985 liability order, to maintain a desegregated school system and otherwise

participate in the Education Improvement Plan I Remedy Order. In support of this motion, the defendant City of Yonkers states:

1. On November 20, 1985, as part of its comprehensive liability order, this Court found that the City of Yonkers ("City") and the Yonkers Board of Education ("YBOE") had engaged in segregative practices and a dual school system existed in Yonkers. *United States v. Yonkers Board of Educ.*, 624 F.Supp. 1276 (1985 S.D.N.Y.), *affirmed*, 837 F.2d 1811 (2d Cir. 1987), *cert. denied*, 486 U.S. 1055 (1988). Following further proceedings, the Court entered the School Desegregation Order ("SDO") on May 13, 1986. *United States v. Yonkers Board of Educ.*, 635 F.Supp. 1538 (S.D.N.Y. 1986), *affirmed*, 837 F.2d 1811 (2d Cir. 1987), *cert. denied*, 486 U.S. 1055 (1988). The relief required by the SDO is commonly referred to as Education Improvement Plan I or EIP I.

2. Since 1986, the City and YBOE have been required to ensure the operation of a desegregated school system that includes an extensive magnet school program, the construction of new schools, the development of additional remedial programs, transportation and many other requirements. Since the entry of the 1986 orders, the annual budget of the Yonkers Public Schools has been the subject of proceedings overseen by the Court's Monitor. During that period, the annual budget of the Yonkers Public Schools has more than doubled, requiring a very significant contribution of municipal resources to ensure compliance with the Court's orders. Moreover, during that period, the State has adjusted its school aid formulas in a manner that negatively impacts

on Yonkers. For example, in 1986, the State reimbursed most of the transportation costs; currently, the State reimburses only a small portion of transportation costs.

3. In compliance with Section J of the SDO, 635 F.Supp. 1551, the City of Yonkers has provided the funding to the Yonkers Board of Education over the past ten years to ensure the achievement and maintenance of a school system that meets the requirements of the 1986 SDO. Nevertheless, despite its best efforts to provide appropriate resources for the Yonkers Board of Education to maintain a desegregated school system, the City of Yonkers lacks sufficient levels of its own resources to meet the requirements of EIP I.

4. In the 1986 SDO, this Court retained jurisdiction to enforce the terms of its remedial orders "and for all purposes consistent with attaining the objectives of this Order." *Id.* at 1553. In ordering the implementation of EIP I, this Court directed the Yonkers Board of Education ("YBOE") to advise the Court if for any reason it was unable to implement the plan because of lack of adequate funding. *Id.* at 1551.

5. In its original 1987 pleadings directed to the added State defendants, the YBOE and NAACP sought prospective relief from the added State defendants to ensure the full and complete implementation of EIP I as well as further relief to ensure a full and complete remedy for vestiges of past segregation. The Second Amended Complaint filed by the NAACP is not limited to a claim against the State defendants for any *additional* relief provided over and above the 1986 remedy orders. The NAACP sought:

> . . . an order enjoining these added state defendants; their successors in office, agents, employees, assigns and all others acting in concert with them, to cease their unlawful acts and to assist in the implementation of plans to remedy the unconstitutional and illegal segregation in the City of Yonkers and the continued effects of unconstitutional and illegal school segregation.

Second Amended Complaint at 13 (Prayer for Relief, paragraph (c)). Similarly, the 1987 Cross-Claim of the Yonkers Board of Education provided that "the Cross-Defendants should be ordered to participate in the existing plan, and in education programs over and above those previously ordered, which are necessary to eradicate the effects of segregation found by this Court in the Yonkers Public Schools to the maximum extent practicable and as soon as possible." Cross-Claim of the Yonkers Board of Education at 21 (Prayer for Relief at (c)).

6. On September 23, 1996, the United States Second Circuit Court of Appeals entered its decision in *United States v. City of Yonkers*, 96 F.3d 600 (2d Cir. 1996), finding that the added State defendants had also engaged in segregative practices that created the segregated conditions found by this Court in 1985. The Court of Appeals found:

- "the defendant state officials may properly be held liable under § 1983 on plaintiffs' claims for prospective injunctive relief to remedy school segregation in Yonkers;"

- "plaintiffs were entitled to prevail against the State institutional defendants under the EEOA . . .;" and

- there is "no doubt that UDC played a role in the perpetration of school segregation in Yonkers" and the district court should "reconsider its view of the duration of UDC liability."

Hence, the Court of Appeals found that the "defendant State officials" and "institutional State defendants" are liable for segregated school conditions and, if upon reconsideration the Court finds there is no bar under the statute of limitations, the UDC may be held liable for housing and school segregation. Following a denial of the applications for rehearing by the Added State defendants, the mandate of the Second Circuit issued.

7. Having found that the State defendants engaged in a constitutional violation creating the segregated conditions in the Yonkers Public Schools, this Court has a duty to ensure that a full and complete remedy is provided. The State of New York defendants have sufficient resources to fully implement the requirements of Educational Improvement Plan I, as set forth in the 1986 SDO.

8. The City of Yonkers has previously advised the Court as well as the appropriate State officials that the City lacks the resources to fully and completely maintain the desegregated system contemplated by EIP I. See, generally, the allegations contained in the Third Party Complaint/Cross Claim, filed by the City of Yonkers on or about February 4, 1997 and the Affidavit of John D. Spencer, dated August

12, 1996, filed with the City's Notice of Motion, dated August 16, 1996. The State has opposed the City's efforts to gain additional resources.

9. The Superintendent of the Yonkers Public Schools has published a proposed budget for the YBOE for the fiscal year ending June 30, 1998 ("FY 98") requiring some $254.5 million in funds. The Superintendent has claimed that such an amount is necessary to fully fund the operations of the YPS and meet the requirements of the SDO. According to the Superintendent, without that amount of funding, the YBOE will not be able to maintain all of the programs and services contemplated by the School Desegregation Order. The currently proposed City budget for FY 98 includes an appropriation of $242 million for the YPS. That appropriation assumes that the State Legislature appropriates to Yonkers all of the amounts provided in FY 97 (including some $22 million in a "one shot" Aid to Distressed Cities appropriation in FY 97) plus $29 million in additional aid. Hence, in order to fund the FY 98 budget of the YPS, the State must appropriate all amounts provided in FY 97 *plus* over $41 million in additional funds.

Wherefore, the defendant City of Yonkers seeks entry of an Order providing that the added State defendants are jointly liable with the City of Yonkers to provide the necessary funding to fully implement the 1986 School Desegregation Order and for such other relief as may be proper under the circumstances.

Appendix

Dated: May 15, 1997

Respectfully submitted,

/s/ Raymond P. Fitzpatrick, Jr.

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